(21,161.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 155.

MARIA MARGARITA VOLCEY SOUFFRONT, WIDOW OF FLEURIAN; MARIA ELIZABETH ODETTE FLEURIAN, AND MARIA ANTOINETTE EMA FLEURIAN, WIDOW OF SOUFFRONT, PLAINTIFFS IN ERROR,

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO AND ERNESTE MAURICE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 29, 1909.

1 At a regular term of the District Court of the United States Within and for the District of Porto Rico Began and Held at the City of San Juan in Said District on the Second Monday in April, the Same Being the 8th Day of Said Month in the Year of Our Lord One Thousand Nine Hundred and Seven and of the Independence of the United States of America the One Hundred and Thirty-first.

Present: The Honorable Bernard S. Rodey, Judge.

On Saturday, June 22, 1907, among the proceedings had, there was an entry upon the journal of said court, which is as follows, to wit:

MARIA M. VOLCEY SOUFFRONT DE FLEURIAN et al.
vs.
LA COMPAGNIE DES SUCRERIES DE PORTO RICO et al.

Now come the plaintiffs by their attorneys Boerman and Llorens and file a replication to the answer in this cause, and upon consideration thereof it appears to come within the rule laid down in the Court's opinion on the demurrer to the answer of the defendants filed June 1st. Now, upon application by Hartzell and Rodriguez the attorneys of said defendants, the cause is dismissed at the costs of the plaintiffs to be taxed by the Clerk, for which execution may issue.

Plaintiffs except to the dismissal hereof.

Be it remembered that heretofore, to wit: the 2nd day of July, 1906, came Maria Margarita Volcey Suffront, widow of Fleurian, a citizen of France and resident of Porto Rico, Maria Odette Fleurian and Maria Antoniette Ema Fleurian by their attorneys Messrs. Boerman and Llorens, and filed in the Clerk's office of the court aforesaid a complaint against La Compagnie des Sucreries de
2 Porto Rico and Erneste Maurice, which said complaint is as follows, to wit:

Complaint.

In the United States District Court for Porto Rico.

MARIA MARGARITA VOLCEY SUFFRONT, Widow of Fleurian; MARIA Elizabeth Odette Fleurian, and Maria Antoniette Ema Fleurian, Widow of Suffront,

against

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE.

Maria Margarita Volcey Suffront, widow of Fleurian, a citizen of France and resident of Porto Rico, Maria Elizabeth Odette Fleu-

rian, a citizen of France and resident now of Spain, and Maria Antoniette Ema Fleurian, widow of Suffront, a citizen and resident of Porto Rico, complaining of La Compagnie des Sucreries de Porto Rico, a corporation organized by and under the Law of France and Erneste Maurice, a citizen and resident of France, allege as follows:

First. That one Clemente Fleurian, a citizen of France and late of the Island of Porto Rico as place of residence, deceased, was, at and before his death seized in fee and entitled to the possession of the following premises, to wit: a certain piece of land known by the name of Hacienda Serrano, containing five hundred cuerdas more or less, situated in the barrio of Capitanejo, Municipal District of Juana Diaz, in this Judicial District of Porto Rico, bounded as follows: North, by Hacienda Potala, formerly of Manuel Ferrer and now of De Ford and Company, the road from Ponce to Guayama, Lands of Ana Maria Collar, Succession de Juan Bautista Campos, Francisco Pilet and Simon Tirado; South by the sea; East by the said Hacienda Potala; West by lands of Francisco Pilet.

Second. That the said Clemente de Fleurian died in the said island of Porto Rico on or about the 24th day of February, 1892, intestate, leaving as his legal succession, his widow, the said
3 Maria Margarita Volcey Suffront, and his only children, the said Maria Elizabeth Odette Fleurian and Maria Antoniette Ema Fleurian, who then at his demise became entitled to the dominion and possession of the said premises, above described.

Third. That on or about the 12th of April 1904, the defendants, who were not then and there or at any time the executors or administrators of the said Clemente de Fleurian, did, without any right or title, enter into and upon the said premises and did possess themselves of the same, and now still possess and unlawfully withhold the possession of the same from the plaintiffs herein to their damage of One Hundred and Fifty Thousand Dollars.

Fourth. That the value of the rents, issues and profits of the said premises since and beginning from the 12th of April 1904 and while the plaintiffs have been excluded therefrom by the defendants is Fifteen Thousand Dollars.

Wherefore the plaintiffs pray judgment against the defendants.

1st. For the recovery of the possession of the demanded premises or for the sum of One Hundred and Fifty Thousand Dollars damages for withholding possession thereof (*which is the value of the said property*).

Second. For the sum of Fifteen Thousand Dollars, the value of the said rents, issues and profits; and besides the costs of this suit.

C. M. BOERMAN,
Attorney for the Plaintiffs.

And afterwards to wit: the 11th day of August, 1906, came La Compagnie des Sucreries de Porto Rico, one of the defendants in this cause by its attorneys Charles Hartzell, Manuel Rodriguez Serra and Francisco Parra, and filed in the Clerk's office of the Court aforesaid demurrer to the complaint herein, which said demurrer is as follows:

In the District Court of the United States for Porto Rico.

MARIA MARGARITA VOLCEY SUFFRONT, Widow of Fleurian; MARIA Elizabeth Odette Fleurian, and Marie Antoniette Ema Fleurian, Widow of Suffront, Plaintiffs,

4 vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE, Defendants.

Comes now the defendant, La Compagnie des Sucreries de Porto Rico, by Charles Hartzel and Manuel Rodriguez Serra and Francisco Parra, its attorneys, and files this its demurrer to the complaint of Plaintiffs filed herein and as grounds for such demurrer said defendant alleges:

1st. That the said complaint does not state facts sufficient to constitute a cause of action against this defendant, in that the said complaint does not allege that the said plaintiffs were ever in possession of the premises described in the complaint. That the said complaint does not allege or state that Clemente Fleurian the alleged former owner of said premises was ever in possession of said premises. That the said complaint does not allege that the plaintiffs were ever ejected from or dispossessed of said premises by the defendants or any other person or corporation. That the said complaint does not allege that the said plaintiffs are now or ever were the owners of said premises. That the said complaint does not allege that at the time of the commencement of said action the said plaintiffs were entitled to the possession of said premises. That the said complaint does not contain any allegation respecting the title of said premises either at the time of the alleged taking possession thereof by the defendants or at any time of the commencement of said action. That is no denial in said complaint of the title of the defendants to said premises. *And*

And for other good and sufficient reasons appearing on the face of said complaint.

CHAS. HARTZELL,
M. RODRIGUEZ SERRA,
FRANCO. PARRA,
Attorneys for Said Defendant.

And on the 18th day of August, 1906, came Erneste Maurice, the other defendant in this case, by his attorneys Charles Hart-

5 zel, Esq., and M. Rodriguez Serra, Esq., and filed in the Clerk's office of the aforesaid court a demurrer to the complaint herein, which said demurrer is as follows, to wit:

Demurrer.

In the District Court of the United States for Porto Rico.

MARIA MARGARITA VOLCEY SUFFRONT, Widow of Fleurian; MARIA Elizabeth Odette Fleurian, and Maria Antoniette Ema Fleurian, Widow of Suffront, Plaintiffs,

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE, Defendants.

Comes now the defendant, Erneste Maurice by Cherles Hartzell and Manuel Rodriguez Serra and Francisco Parra its attorneys and files this his demurrer to the complaint of plaintiffs filed herein and as ground for such demurrer said defendant alleges:

1st. That the said complaint does not state facts sufficient to constitute a cause of action against this defendant, in that the said complaint does not allege that the said plaintiffs are or were ever in possesion of the premises described in the complaint. That the said complaint does not allege or state that Clemente Fleurian the alleged former owner of said premises was ever in possession of said premises. That the said complaint does not allege that the plaintiff was ever ejected from or dispossessed of said premises by the defendant. That the complaint does not allege that the said plaintiffs are now or ever were the owners of said premises. That the said complaint does not allege that at the time of the commencement of said action the said plaintiffs were entitled to the possession of said premises. That the said complaint does not contain any allegation respecting the title of said premises, either at the time of the alleged taking possession thereof, by the defendants or at the time of the commence-
6 ment of said action. That there is no denial in said complaint of the title of the defendants to said premises.

And for other good and sufficient reasons appearing on the face of said complaint.

CHARLES HATZELL,
M. RODRIGUEZ SERRA,
Attorneys for Said Defendant.

And on the 14th day of January, 1907, an entry was made upon the journal of said Court in said cause, which said entry is as follows, to wit:

No. 207.

M. MARGARITY VOLCY SOUFFRONT et al.

vs.

LA COMPAGNIE DES SUCRERIES DE P. R. et al.

The demurrer to the complaint herein is called up, Chas. Hartzell, Esq., appearing for the defendants in behalf thereof, and C. M. Boerman for the plaintiffs in opposition thereto, and after being

heard and duly considered by the Court the plaintiffs is ordered to amend the complaint (by interlineation) as to damages claimed, and to file a bill of particulars as to rents and profits, which he promises to do forthwith. The demurrer is overruled as to the other grounds contained therein, to which the defendants excepts. Said defendants are ordered to file an answer herein on or before the 17th inst.

And on the 16th day of January, 1907, came the plaintiffs by their attorneys Messrs. Boerman & Llorens and filed in the Clerk's office of said Court a Bill of Particulars herein, which said bill of particulars is as follows, to wit:

United States District Court for Porto Rico.

MARIA VOLCY SOUFFRONT DE FLEURIAN et al.
against
COMPAGNIE DES SUCRERIES DE PORTO RICO et al.

Bill of Particulars.

The rents and income for the year of the crop of 1904 to 1905, that is to say of the first crop since the occupation by the defendants are computed as follows:

7 There are over five hundred acres of sugar land of good quality in the Serrano. The yearly yield per acre in the neighborhood of the Serrano averages from thirty to ninety dollars. Putting the minimum of thirty dollars' profit net per acre the value of the income in its minimum, of which the plaintiffs were deprived during the year 1904, 1905 crop only by the occupation of the defendants, amounts to Fifteen Thousand Dollars for the crop of that year alone.

C. M. BOERMAN AND
LUIS LLORENS TORRES,
Attorneys for the Plaintiffs.

And on January 22nd, 1907, came the defendants by their attorneys, and filed in the Clerk's office of said Court an answer in this cause, which said answer is as follows, to wit:

In the District Court of the United States for Porto Rico.

MARIA MARGARITA VOLCY SOUFFRONT, Widow of Fleurian; MARIA Elizabeth Odette Fleurian, and Maria Antoniette Ema Fleurian, Widow of Souffront, Plaintiffs,

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTO MAURICE, Defendants.

Answer.

Come now the above named defendants, La Compagnie des Sucreries de Porto Rico and Ernesto Maurice, by Charles Hatzel and Man-

uel Rodriguez Serra, their attorneys, and file this their joint and several answer to the complaint of plaintiffs herein.

And thereupon, for a first defense, they allege and state that they admit the residence of the plaintiffs as alleged in said complaint that they admit the residence of the defendants and that the said defendants La Compagnie des Sucreries de Porto Rico, is a corporation organized as alleged in said complaint. And further answering, these defendants deny each and every other allegation in said complaint contained.

8 And for a second and further answer to the said complaint of plaintiff filed herein, these defendants allege that heretofore and prior to the year 1881, David Laporte, Doña Emilia and Doña Agatha Laporte and Don José Simon Adrian Armando Lombard were the owners and in the peace-ble possession of that certain tract of land situated in the barrio of Capitanejo, municipal district of Juana Diaz, and known as the hacienda "Serrano", the same being the premises described in plaintiffs' complaint herein. And that during the said year 1881, the said parties as the owners of said property instituted, in accordance with the law of Porto Rico, the possessory proceedings for said property as provided by said laws. And that, in accordance with the said proceedings and in pursuance thereof, the quiet and pacific possession of said premises having been shown to be in said parties by virtue of legal title, the said possession was by the proper court directed to be recorded and registered in the name of said parties as the owners thereof, which said registering and recording was accordingly done and performed. That thereafter, and on the sixteenth day of October, A. D. 1883, by deed of sale and transfer, which was duly executed and recorded in the registry of property, the said aforenamed parties sold and transferred the said premises described in the complaint herein, to one Juan Forgas and José Gallart, said sale being made of said properties free and clear of all incumbrances, said vendors binding themselves to guarantee the title to the same and to answer for any obligations for which said property might be liable. And defendants further allege that, in pursuance of the execution of the said deed of October 16, 1883, the said Forgas and Gallart entered upon the peace-ble possession of the said premises as the owners thereof, under their said title as hereinbefore described, and continued, together with their heirs and successors, to occupy the same peaceably and without interruption for more than the period of twenty years all parties being present. And that the said parties and their

9 successors and privies continued in the occupancy of said premises peaceably and as such owners thereof with registered title, until the month of April, 1904, at which time the successors of said owners and holders of said property having then succeeded to the title thereof, sold, transferred and conveyed by good and sufficient deed of transfer and conveyance, unto the defendant, La Compagnie des Sucreries de Porto Rico, all of the aforesaid property, which deed was duly registered in the registry of property at Ponce, Porto Rico. And the said defendant company entered into the peaceable possession of said premises as the owner thereof,

by virtue of said sale and transfer to it, and so continued as the owner thereof in the peaceable and full possession thereof as such owner until the seventeenth day of June, 1905, at which time the said defendant, by deed of conveyance duly executed before the Notary Horacio S. Belaval, in Ponce, Porto Rico, sold transferred and conveyed unto the defendant Ernesto Maurice four hundred and eighty-six and fifty-hundredths (486.50) cuerdas of the said lands included within the said property described in plaintiffs' complaint, and known as the Hacienda "Serrano", the said defendant company retaining in its possession, as the owner thereof, the balance of the said lands of the said hacienda "Serrano." And that at the present time the said defendant Ernesto Maurice is the owner of and in the peaceable possession of the said four hundred and eighty six and fifty-hundredths (486.50) cuerdas of said lands, and that the said defendant La Compagnie des Sucreries de Porto Rico is the owner of and in the possession of the balance thereof.

And these defendants allege that by virtue of the laws of Porto Rico in such cases made and provided, and particularly by section 1858 of the Civil Code of Porto Rico, it is specifically provided that ownership and other property rights in real property shall prescribe by possession for ten years as to persons present, and for twenty years with regard to those absent, with good faith and a proper title.

10 And that these defendants and their predecessors in the ownership of said premises have been and were in the peaceable and undisturbed possession of the said premises described in said plaintiffs' complaint, from and after the date of the registration of the said deed to the said Gallart and Forgas in the year 1883, up to the present time, in good faith and with a proper and registered title thereto, and that therefore the said action of the plaintiffs herein has prescribed, in accordance with the statute aforesaid, and is barred by the terms thereof.

And for a third and further defense to the complaint of plaintiffs filed herein, these defendants allege that heretofore, on the ninth day of October, 1879, the said Clemente de Fleurian, being the person named in the plaintiffs' complaint herein, and through whom, as the heirs and successors thereof, the said plaintiffs herein claim the title to the premises described in plaintiffs' complaint, by means of certain fraudulent and fictitious proceedings and representations, secured and alleged or pretended deed from the owners of the premises described in plaintiffs' complaint herein and known as the hacienda "Serrano," which said deed, however, never was registered in the registry of property for the district where said lands were situated in Porto Rico. And that thereafter the said Clemente de Fleurian, falsely pretending to be the owner of the said premises, executed to one Fernando Labastido, a resident of Ponce, Porto Rico, a mortgage on said premises, which said mortgage was caused to be registered in the registry of property in the district where said property was situated, the said mortgage being executed on the eighteenth day of February, 1880. That the said pretended deed of said premises executed in favor of the said Fleurian, was a private contract, and that the same was executed as aforesaid, in pursuance of

and by virtue of certain false, fraudulent and illegal representations by the said Fleurian, and that the said Fleurian wholly and
11 absolutely failed to carry out any of the terms or provisions of the said deed to him of the said premises. That the said deed was never delivered to the said Fleurian by the parties executing the same, but that the possession thereof was illegally and wrongfully secured by the said Fleurian from the notary who had possession thereof for the purpose of executing certain other documents which were to be executed in connection with the proposed sale of said premises to the said Fleurian. That thereafter, proceedings were taken by the owners of said property to cause to be cancelled the said private contract of sale to the said Fleurian and to have declared the nullity thereof, as well as to have declared the nullity and rescission of the said mortgage to the said Labastide, which said proceedings were carried to a final determination in the courts of the republic of France. And that a decision was therein rendered by the said courts, declaring the nullity of the said private contract of sale to the said Fleurian, as well as the nullity of the said mortgage to the said Labastide. That pending the final determination of the said proceedings, the owners of said property sold and conveyed the same to one Juan Forgas and one José Gallart, through whom, by proper conveyance, the title to the said premises has come to these defendants. And that these defendants are the successors and privies in the ownership of said property to said original owners and to the said Gallart and Forgas and the succession of Gallart, by virtue of the said sale to the said Forgas and Gallart. That in the deed selling and conveying said premises by the said owner to the said Forgas and Gallart, it was expressly contracted and agreed that the said owners should conduct the litigation necessary to free the title of said premises from any lien, cloud or incumbrance whatsoever, and the same was made the express condition of the payment of a large portion of the purchase price of said premises. And that in pursuance of said obligation resting upon the said owners of said property, in addition to the pro-
12 ceedings in the courts of France hereinbefore referred to, the said owners of the said property commenced their action in the court of first instance in the judicial district of Ponce, Porto Rico, the district where the said lands were located, the said court having full jurisdiction over the said property and over the said defendants. The object of said suit being to cancel and to have declared null and void or for the rescission, as the case might be, of the private contract of sale of the said plantation described in plaintiffs' complaint and known as "Serrano" and also to have declared null and void and for the rescission and cancellation of the said mortgage executed by the said Fleurian in favor of the said Labastide. That such proceedings were had in said cause that on the 26th day of October, 1889, the said court of first instance of the judicial district of Ponce, Porto Rico, rendered its judgment and decision in the said cause, which said judgment and decision is in the words and figures following, to wit:

Judgment.

"In the city of Ponce, the twenty-sixth day of the month of October, eighteen hundred and ninety-nine, the acting judge of first instance, Don Manuel Becerra y Garate having heard this declaratory action of greater import prosecuted between the parties, on the one hand, and Don Daniel Casimiro, Doña Emilia and Doña Agatha and Don Armando Lombard, domiciled in the French Republic, property owners, represented by the solicitor Don Luis Gautier y Quesada, and advised by lawyer Don José Severe Quiñones, and on the other hand Don Clemente de Fleurian and Don Fernando Labastide, domiciled respectively on Torres street and Plaza Principal of the city, the first named party being without representation as he failed to appear, and the case was prosecuted by default and the second named represented by the solicitor Don R. Ulpiano Colom advised by lawyer don Herminio Diaz, which said action is brought to make null and void, or for the rescission as the case may be, of the private contract of sale of the sugar cane plantation called
13 "El Serrano" which is situated in the district of Juana Diaz, jurisdiction of the city of Ponce, which said contract was executed by the parties first named in favor of Don Clemente de Fleurian, in the town of Anduze (French Republic) on the ninth day of October, eighteen hundred and seventy-nine, and also to make null and void or for the rescission of subsidy and consequent cancellation of the mortgage on the said propery executed in Juana Diaz the eighteen day of February, eighteen hundred and eighty by don Clemente de Fleurian in favor of don Fernando Labastide.

It appearing that the solicitor don Luis Gautier in the name of David Laporte, Doña Emilia and doña Agatha of the same surname and Don José Simón Adrian Armando Lombard files a complaint with the court against Don Clemente de Fleurian and Don Fernando Labastide to make null and void, or for the rescission of a private contract of sale of the property called "Serrano", situated in this jurisdiction, district of Juana Diaz and in any case to declare null and void the mortgage instrument executed between the first and second defendants, basing the same on the facts and on the points at law alleged in the complaint, and

2. It appearing, that the complaint having been admitted the same was referred and that summons were issued in legal form and served upon the solicitor Don José María de Goicochea who entered his appearance in due time in the name of Don Fernando Labastide and was ordered to answer the same within twenty days, and that the other defendant Don Clemente de Fleurian failed to do so, for which reasons and upon petition of the other side, he was charged with default, which was admitted, and upon answer being made to the complaint and the decision thereon having been notified in due time, all subsequent proceedings were conducted in open court as provided by the law of Civil Procedure, and

3. It appearing, that don Fernando Labastide for the reasons given in a writing dated June seventh, eighteen hundred and eighty-
14 seven, demurs to the complaint because of want of capacity of the plaintiff and of cause of action, praying that he be

not compelled to answer the complaint until both grounds of the demurrer are removed, that these points having been proceeded with in legal form by judgment rendered August fifth, eighteen hundred and eighty seven, said demurrer was dismissed and on appeal it was confirmed by the most excellent Audiencia of the Province under date of February seventeenth, eighteen hundred and eighty-eight; and

4. It appearing that on petition of the plaintiff, the records were returned and Labastide was ordered to answer the complaint within the term of ten days, and the solicitor Don R. Ulpiano Colom having appeared in his name, because don José Marí-a de Goicochea had ceased in his functions as such, he was considered a party, and the said order was served on him; the said solicitor prays, in a writing dated March twenty-second, first — that declaration be made that the contract entered into and between Messrs. Lapoite and de Fleurian is valid, because in the execution thereof there were present all intrinsic and extrinsic formalities required by law on contracts, and that, in case there should be any fraud, the defendants are not joined in order to solicit the nullity of the said contract. Second,—that Don Clemente de Fleurian being the owner of the property "Serrano" he could have legally mortgaged the same to Don Fernando Labastide, and third,—that the contract of purchase and sale, if declared valid, the plaintiffs had not the necessary capacity to solicit the nullity of the mortgage basing himself on the facts and points of law therein alleged.

5. It appearing, that the said paper having been referred for replication to the plaintiff for the term of ten days, in a writing dated June fourteenth he returned the same asking that the demurrer filed by the defendant be dismissed and that the contract of purchase and sale of the property referred to, executed in Anduze (France), on the ninth day of October, eighteen hundred and eighty nine, be declared null and void or else rescinded, which said contract was executed by the plaintiffs in favor of don Clemente de Fleurian, and in any case null and void or else rescinded and of no legal value, the mortgage obligation executed by the said don Clemente de Fleurian in favor of don Fernando Labastide on the eighteen day of February, eighteen hundred and eighty on the afore-said property for the sum of thirty six thousand and one pesos and fourteen centavos, current money, and interest thereon at one and one-half per cent per month from and after the maturity thereof, until payment actually made and that the said mortgage be ordered cancelled with costs to the defendants, for the reasons stated in the complaint and replication; and

6. It appearing, that the replication having been referred to Labastide for rejoinder, he solicits the dismissal of the claim of the plaintiff until the present time, and that decission be rendered as prayed by him in his answer to the complaint, adding that if in the contract of purchase and sale, executed by de Fleurian, it should be declared that there was no fraud and that therefore the same cannot be declared null and void and only to the rescission for want

of compliance with the conditions stipulated, then that the mortgage be considered as valid inasmuch as it was executed on a legitimate title.

7. It appearing, that upon petition of the parties, issues were joined and the term of ten days was fixed as the time within which the introduction of evidence should take place, and the same being postponed for ten days longer, the extraordinary time was granted for the taking of the testimony in the French Republic, declaring as revelant all the evidence proposed by both parties, and the first term having been definitely closed and the second term opened, the testimony that was to be taken for the plaintiffs in the republic referred to, was so taken, but not so the testimony for the defendant Labastide who has not as yet returned the letters rogatory
16 which were delivered to his solicitor, and those which are in the French language have been translated by the interpreter of the government, and

8. It appearing, that from the evidence submitted by the plaintiffs, it appearers to be proved that at the beginning of the year eighteen hundred and seventy-nine, Don Clemente de Fleurian, manager of the plantation above referred to, and Don Enrrique Mazade, who had just arrived from France, on the recommendation of his wife, Doña Emilia Laporte, and the other co-owners of the aforesaid property, so as to know the condition of this property, they iniciated a project of purchase and sale of the same, and for an association between both of them for the operation thereof; that Mazade having reported to his constituents on his return to France, the latter accepted in principle the idea of sale and association; that in consequence thereof de Fleurian at the end of June of the year eighteen hundred and seventy-nine went to France and there the interested parties agreed to the carrying out of the said project, with the modification of setting forth the same in two instruments, one of sale of the real property to de Fleurian and another of association between the latter and Mazade; that this was the birth of the first private contract signed at Sommieres on the twenty-sixth day of August, eighteen hundred and seventy-nine in virtue of which they sold the property to de Fleurian, and which said contract became void because it was rejected by the interested parties who substituted the same with another private instrument drafted by the notary A. Augusto Gervais at Anduze the ninth day of October, eighteen hundred and seventy-nine, for the same sale, although under conditions more favorable for the person that appeared as purchaser, in which fact the parties are agreed, and

9. It appearing, that in the first agreement the persons acquiring the property were really Don Clemente de Fleurian and don Enrrique Mazade as proven by the letters that the former addressed to his clerk in Ponce, Don Luis Lafaye, dated July thirtieth,
17 August twenty-seventh and November seventh, eighteen hundred and seventy-nine folios 101, 103 over and 121 of Record No. 1, Roll of Evidence for the plaintiffs, and by his correspondence in France with Mazade, folio- 129 over, 134, 141 over and 147 of the said record, and that likewise Don Adolfo Souffront, father-

in-law of de Fleurian was also with them, partner in the association for acquiring the property in the private agreement of October ninth as per letters of October fifteenth, eighteen hundred and seventy-nine, memorandum of subscription from the partners, testimony of the notary Gervais and ratifications of the latter respectively appearing at folios seventy-four, eighty-two, over, one hundred and nine, one hundred and fifty-two, three hundred and ninety-four, three hundred and ninety-six over, and four hundred and two of record Nos. 1 and 2, and

10. It appearing, that it was an essential condition of the agreement of sale to de Fleurian and the *sine qua non* his association first, with Dr. Mazade, and after, with the latter and with Sr. Souffront, which facts are proven and are set forth at folios 101, 103 over, 109, 121, 363, 374, 73, 74, 291 over, and 340; and

11. It appearing, that don Clemente de Fleurian was the cause for not having the two instruments of sale and of association referred to in one single instrument on the plea that Mr. Enrique Mazade could not appear in a single instrument as vender and vendee, an allegation which is impertinent; fact proven at folio- 74, 75, 182 over, 103, and 125 over; and

12. It appearing, that don Clemente de Fleurian, without any authority therefor came before the other interested parties and before the notary, Gervais, as verbal mandatory of his father-in-law Souffront, and set forth and dictated the conditions of the association relative to Souffront, who, if he consented later on to be a participant in the said association, it was under the new basis agreed upon with Messrs. Lombard and Mazade, and to save his son-
18 in-law de Fleurian, all of which is shown at folio- 73, 74, 75 82 over, 296 over, 374, 394, 396 over, 402 and 447; and

13. It appearing, that de Fleurian obtained one of the originals of the private instrument of sale of October ninth, not from the vendors of the real property, but of the notary Gervais who testifies that he had the same in trust in order to determine from it the instrument of association which was left with him for some days, and finally he delivered the same to him and the constant request of don Enrique Mazade, de Fleurian alleging no other reason for his resistance except the condition of recording the said instrument at Limoges on the ground of economy, namely,—because of his relations with the Director of the Registry of that place, which information is cited in the preceeding number relative to Mr. Gervais, and in the second and third depositions appearing at folio 360, according to which de Fleurian did not receive the said copy from the parties, and offered to return it after having the same recorded, which he did not do until many months thereafter; and

14. It appearing, that in the aforesaid testimony of Mr. Adolfo Souffront, folio 734, after stating that Messrs. Lombard and Mazade on the thirty-first day of October, eighteen hundred and seventy-nine, in view of the obligations in which they were left by de Fleurian, went to Burdees to visit the witness and adds that then he learned that de Fleurian, without his authority had taken his name to bind him to join the association agreed to with a subscrip-

tion of seventy-five thousand francs, which amount he did not have; and that they agreed upon other basis as set forth in No. 5, to carry out which de Fleurian delivered the copy of the contract of sale to the Notary Martin, and that on the sixth of November Lombard and Mazade went again to Burdees when the witness continued in his preparations for his trip to Porto Rico; that de Fleurian had left the day before, in the evening, and that he was ignorant of his whereabouts; that he thought that he was
19 at Farles but Lombard explained to him that he was not there and that he afterwards learned that the said de Fleurian had withdrawn from the said Martin the said instrument of sale; that the truth of these facts in the essential parts thereof is shown by the letter of de Fleurian to Lafaya under date of December nineteenth, eighteen hundred and seventy-nine, folio 11 over, in which he acknowledges that Lombard went actually to Burdees on the sixth of November to try to obtain the instrument of sale, but that when his father limited himself to say that he, de Fleurian was in the house of his father in law he attempted to summon him to intimidate him he noted certain contradiction, whether it was because de Fleurian was in the house of his father-in-law Souffront, who was living at Burdees, that he was not at Farbes, as affirmed by Lombard, or whether because the same Souffront declared that he was not in his house as he had left the previous evening.

15. It appearing, that in view of these and other facts, such as the advises received from Lucas Amadee which are acknowledged in paragraph eight of the statement of facts in the rejoinder of Labastide and in the testimony of the said Amadee at folio 296 over, regarding the condition of the property and of the suspicious maneuvers of de Fleurian, which was the cause of the second trip to Burdees of Lombard and Mazade, that the expressed submission of the parties to the civil court at Nimes, sixth general clause of the contract of sale, folio 8, the said Laporte revoking the power which they had granted, in November, eighteen hundred and seventy-six, to de Fleurian for the management of the "Serrano" and granting the said power to the said Lombard for the purpose of having his come to this Island and take charge at once of the said property, and on the seventeenth day of the said month of November, they filed a complaint against the said de Fleurian before the said court for the rendition of accounts and for the nullity of the private contract of sale signed in Anduze on the ninth day
20 of October preceding thereto, as per testimony at folio fourteen of the main record.

16. It appearing, that on the twenty first day of the aforesaid month of November, de Fleurian was cited and summoned to answer the complaint, which said proceedure was executed by serving the summons on his wife at his residence, as he could not be found, notwithstanding which de Fleurian had full and complete knowledge of the said summons from and after the twenty-sixth of the said month, or namely, five days after the service thereof, and

17. It appearing, that the said suit having been prosecuted before

the civil court at Nimes, de Fleurian in default, by judgment rendered May tenth, eighteen hundred and eighty, the said private instrument of sale of October ninth next preceding was cancelled as viciated by fraud and deceit; that de Fleurian having been notified of this judgment, through diplomatic channels on the twenty-eighth of the same month, appeared in accordance with French procedure on the twenty-seventh of October next succeeding the eve of the day for the expiration of the time for making opposition to said judgment, and after availing himself of all remedies, including among them that of the want of jurisdiction of the court of Nimes, to which court the interested party had expressly submitted themselves in the private contract dated October ninth, of the year eighteen hundred and seventy-nine, on the twenty-fourth day of March, eighteen hundred and eighty-two a new judgment was rendered confirming the previous judgment for the following reasons: Because the document of October ninth was a new project, the efficacy of which depended on the execution of the contract of association between de Fleurian, Mazade and Souffront, which said association was in fact the one to which the real property called "Serrano" had been sold; Because, de Fleurian escaped after obtaining a copy of the project of sale unheedful of his obligations; Because, the consent of the vendors had been obtained by surprise, through
the deceit and fraud of de Fleurian, which was sufficient to
21 declare the nullity of the contract, which should moreover be
null and void as de Fleurian had not complied with the conditions thereof and because the essential condition of the agreement was wanting, which was the condition of the association through the fault of the said de Fleurian, who, notwithstanding, did not fear to mortgage the property to a certain Sr. Labastide in violation of clause second of the said contract, according to which the credit of the vendors had preference over any other.

18. It appearing, that by reason of this judgment, on the eleventh day of June of the year eighty-three a criminal prosecution was brought against de Fleurian at Alais, and that the Correctional Court of the said city by judgment rendered March eighth, eighteen-hundred and eighty-four sentenced him to three years imprisonment and to a fine of fifteen hundred francs for the crime of swindle and abuse of confidence; that de Fleurian having appealed from this judgment, the court of appeals at Nimes dismissing the charge of abuse of confidence reduced the penalty to one year imprisonment for the reasons stated in the testimony at folio 34.

19. It appearing, that de Fleurian having taken an appeal to the judgment rendered in the suit for the nullity of the contract, on the twenty-fourth day of March, eighteen hundred and eighty-two, the superior court affirmed the same on the same day and month of the year eighty-five for the following reasons on which was based the judgment of the criminal action, namely,—that de Fleurian had made use of fraudulent means to obtain the consent of the owners of the plantation "Serrano", that said means had not for their object to deceive the said owners as to certain conditions of the sale, but as to the essential part of the contract, it being evident that without such means the said real property would have not

being sold; that de Fleurian, by means of deceitful writings
22 made them believe that it was to their great interest to dispose of the property; that in order to appear with a credit which he did not have, he first alleged to have an association with Mazade and then another with the latter and with Souffront, the joining of the latter being the reason which induced the vendors to agree to the sale, as they knew perfectly his honesty, intelligence and responsability; such a promise of association was merely a fallacious maneuver, as it appears from the testimony of Souffront that he had never offered to his son-in-law his assistance, and much less to subscribe the amount of seventy-five thousand francs; that having procured by such means the private instrument of October ninth, eighteen hundred and seventy-nine, and without paying any further attention to the perfection thereof, de Fleurian had the same recorded and, notwithstanding the protests of the vendors he gave notice that he was the only owner and issued formal orders to conceal his books of accounts so that the fraud which he had committed could not be shown; and lastly, coming to Porto Rico where, on the day following his arrival, he executed in favor of an alleged creditor a mortgage for the amount of one hundred and eighty-five thousand francs; that it was certainly his purpose, on the foreclosure of the property by reason of the said mortgage, to keep the whole or part of the said amount on one hundred and eighty-five thousand francs, whatever the result of the sale, the nullity of which was being litigated, should be; the said mortgage obligation and the special conditions thereof, where fraud is manifest, make clear retrospectively the preceding facts and show that in all the negociations arising out of the private documents of August twenty-sixth and October ninth, eighteen hundred and seventy-nine, de Fleurian had no other purpose but that of acquiring for himself a title that would permit him to appropriate the property of others without paying there-
23 for; and that the second instrument of August twenty-sixth, the compliance of which had been solicited by de Fleurian in this second instance, the same causes of nullity vitiating that of October ninth, eighteen hundred and seventy-nine would be applicable, if, by common consent, the parties had not cancelled the first named instrument in order to substitute it by the second.

20. It appearing, that de Fleurian having taken an appeal to the Court of Cassation at Paris, the same was dismissed on May seventeenth, eighteen hundred and eighty six, declaring that in order to annual as being vitiated by fraud, the instruments of August twenty-sixth and of October ninth, eighteen hundred and seventy-nine, the judgment appealed from had been based on the private maneuvers of de Fleurian, without which the other parties would not have consented to the said instruments, which said instruments brought forth the fraudulent character of the said maneuvers, not only *be* the deeds that constituted them, but also later deeds which reveal their fraudulent purpose; and that thus, far from having violated the provisions of the law, the judgment appealed from had applied the law correctly.

21. It appearing, that in the executory action in the French

courts, notice is taken of the character of the accounts kept by de Fleurian during his administration of the plantation "Serrano", and that a certified copy of the testimony of the expert Gascuel has been brought to this record, folio 422, according to which testimony, de Fleurian knowingly violated all the rules of accounting, with fraudulent purposes, citing minutely a multitude of data and divers accounts, among which that of the same de Fleurian and of Don Fernando Labastide which was a constant object for the most energetic orders and instructions from de Fleurian to his Clerk don Luis Lafaye to conceal from the whole world the said books of ac-
24 counts, the prohibition of communicating with the owners of the property, all of which is verified by the letters appearing at folios 101, 103 over, 111, 121, 125 over, 149-48 over and 95, the terms of which confirm the testimony of Don Adolfo Souffront at folio 374.

22. It appearing, that de Fleurian on divers occasions and during his stay in France secured the endorsement of the owners of the property, which compelled Lombard to go to Anduze to *confirm* with Mazade as partner of de Fleurian and hence the trip of both of them to Burdees on the thirty-first day of October, eighteen hundred and seventy nine, his interview with Souffront, the declarations of the former regarding his obligations with Lombard, Laporte and Mazade and the agreement of Souffront to reimburse the latter, the amount of twenty-five thousand francs paid by them, the latter adding that de Fleurian delivered a receipt which he had issued by Sr. Coste for the thirty-one shares of Sommiers Gas which was the subscription of Mazade to the association that he had *been* agreed, folio- 363 and 374.

23. It appearing, that all the data herein cited is legally proven in this case, the old notary Gervias has ratified in form all his acts, folio- 74, 75, 82 over and 447, Don Luis Lafaye and Don Lucas Amadee have identified all the letters of de Fleurian as having been written by his own hand and the notes already mentioned, both of them testifying that they had delivered those documents to Mr. Lombard that he might make use of same as he might deem convenient, in view of the justice that favored the Laportes as against the maneuvering of de Fleurian; that such letters and notes have also been identified by experts, said experts agreeing that the same are in the handwriting of the said de Fleurian, with the exception of a change in the signature which is explained by the same de Fleurian in the letter which he addressed to Laporte under date
25 of December nineteenth, eighteen hundred and seventy-nine, folio 111 over; that de Fleurian (folio 116) acknowledged those addressed to Laporte on June twenty-eighth and November thirtieth, eighteen hundred and seventy nine (folios 47 over and 98) and later having been called to acknowledge the others, he always refused to appear and the same is set forth in the proceedings at folios 257 to 337; that de Fleurian was summoned three times to answer certain questions contained in the interrogatory folio 340, and having been twice warned that he would be deemed to have confessed, the court resolved to make the declaration at such time as provided by article 592 of the law of Civil Proceedure, the seventh

question referring to the fidelity and correction of the translations of judgments rendered by the French Courts, the abstracts of which have hereinbefore been quoted.

24. It appearing, that in the clauses of the private contract of October ninth, eighteen hundred and seventy nine, at folio 8, among others there are the following: 1,—that the failure to make a single payment on the date agreed to would make payable the total of the price, and upon failure to pay, the vendors would at once enter into full possession, usufruct and administration of the real property, the purchaser loosing whatever he might have paid on account, all of which is in accordance with the French legislation therein, cited, and 2,—that the vendors would have preference in any case over any other indebtedness of whatever nature created by de Fleurian.

25. It appearing, that on the third day of January, eighteen hundred and eighty de Fleurian recorded in the registry of Limoges, France, a copy of the private contract of October ninth next preceding, which he had procured, and after legalizing the signatures and after writing to the consular agent of his nation at Ponce,
26 soliciting his protection, he came to Porto Rico, and on the day after his arrival, the eighteenth of February, eighteen hundred and eighty, he went to Juana Diaz, where he executed in favor of Don Fernando Labastide an instrument acknowledging himself to be a debtor to him for the amount of thirty-six thousand eight hundred and eleven pesos and mortgaging in his favor the sugar cane plantaiton "El Serrano", binding himself to pay the said amount two months after, and both contracting parties submitted themselves to the Court of First Instance of San German; this instrument was recorded in the Registry of Property on the eighth day of March, eighteen days after its execution.

26. It appearing, from the expert testimony given by Mr. Gascuel in the French proceedings against de Fleurian, that having examined his accounts and specially the account of Labastide on the thirty first of December, eighteen hundred and seventy nine, this latter was a debtor in the amount of six thousand and two pesos and fifteen centavos, a debit which does not appear settled, for which reason it seemed impossible that during a period of four or five months he could have paid the same and further advance thirty-seven thousand; that this opinion appears corroborated repeatedly by the same de Fleurian in his aforesaid letters which have been verified, addressed to Lafaye under dates of June twenty-eighth, November twenty-one and December six, eighteen hundred and seventy-nine, and by the testimony of don Lucas Amadeo, set forth at folio 60 over in the criminal cause, which upon complaint of the Laportes, was prosecuted in this Island in the year eighteen hundred and eighty-one, in which there is conflicting testimony of de Fleurian and Labastide, folio 50 over and 59 over, where they could never explain the origin of the said credit in favor of the latter, for which reason the court in paragraph 9 of the statement of facts of
27 the judgment rendered under date of October eighteenth, eighteen hundred and eighty-one, which said judgment was affirmed by the higher court by its decission of January twenty-ninth,

eighteen hundred and eighty-three, folios two hundred and one and two hundred and eleven, that in the answers of the defendants to the interrogatories there were certain contradictions showing that the statement of facts claimed by them in order to justify the "mortgage credit" was not true.

27. It appearing, that on December tenth, eighteen hundred and seventy-nine don Lucas Amadeo delivered the plantation "El serrano" to don David Laporte and to don Armando Lombard folio 239, the said Amadeo testifying, folio 296 over, that he had no inconvenience to deliver the same to them because in their name and in the name of the other co-owners he had been managing the same by virtue of the substitution of the power made to him by de Fleurian on his going to Europe in June of eighteen hundred and seventy-nine; that don Clemente de Fleurian has never possessed the real property aforesaid, except as manager thereof, that he applied unsuccessfully for three injunctions for the purpose of recovering the same, folio 239; that after being notified, on May twenty-eighth, eighteen hundred and eighty, of the decision of the civil court of Nimes, which annulled the private instruments of October ninth next*h* preceding, he attempted to record the same in the registry of property at Ponce, in which he was also unsuccessful, as well as in recording even a cautionary notice.

28. It appearing, that in eighteen hundred and eighty-one the Laporte instituted possessory proceedings of the said property in which there were summoned as abutting owners, Don Fernando Labastide and his wife, without making opposition and the quiet
28 and pacific possession having been shown in virtue of legal title, the same was recorded in the aforesaid registry of property, folios 175 over and 263, and that with the said title, by public instrument of October sixteenth, eighteen hundred and eighty-three, folio 200, they sold the property to Don Juan Forgas and to Don Jose Gallart, free of all incumbrances, the vendors binding themselves to guarantee the title to the same as well as to answer for all obligations for which the said property might be liable.

29. It appearing, that on the expiration of the term stipulated in the mortgage instrument hereinbefore mentioned, April, eighteen hundred and eighty, Don Fernando Labastide instituted an action of foreclosure against don Clemente de Fleurian and the mortgaged property having been attached, the said Laportes brought a criminal complaint against both parties for swindle, and said cause having been prosecuted until its termination, they were acquitted in first and second instance, because of the fact that de Fleurian showed a title which had not been judicially declared insufficient. (Judgments of December nineteenth, eighteen hundred and eighty one, and January twenty-ninth eighteen hundred and eighty-three, folios 206 and 211; from which said judgments an appeal on cassation having been taken by the complainants, the same was dismissed, folio 286), and

30. It appearing, that by reason of the sale of the property in question made by the Laportes in favor of Messrs. Forgas and Gallart, the newspaper, El popular, of this city, published a communi-

cation qualifying said sale as a swindle, which was the cause of a criminal action prosecuted officially, which terminated on a dismissal affirmed by the Supreme Court, in which, among other things, it was held that the crime complained against did not exist, inasmuch as de Fleurian did not present an authentic title, nor had he made any opposition to the possessory proceedings brought by the Laportes, nor had he brought any dominio action, but that on the contrary, there were legal merits to acknowledge the right of the estate of Laporte to make the sale which had been carried out (folio 186).

31. It appearing, that with the necessary requisites, on the ninth day of May, eighteen hundred and eighty-seven, the Laporte heirs, Don David Casimiro, Doña Emilia and Doña Agatha and Don Armando Lombard brought this declaratory action of greater import against Don Clemente de Fleurian and Don Fernando Labastide for the nullity and subsidiary rescission of the private contract of sale of the plantation "El Serrano" signed at Anduze on the ninth day of October, eighteen hundred and seventy-nine, and for the nullity or subsidiary rescission and the proper cancellation of the mortgage on the said property executed by de Fleurian in favor of don Fernando Labastide, the eighteenth day of February, eighteen hundred and eighty.

32. It appearing, that upon the expiration of the term for the introduction of evidence, and the joining of same having been ordered, the original records were delivered to the parties for conclusion, the plaintiff asking that judgment be rendered as prayed for in their complaint and replication, and the defendant Labastide prays that in the decission notice must be taken of the reasons set forth in his answer and rejoinder.

33. It appearing, that the records having been returned and considering the same as having been completed, the said records were ordered to be brought for hearing, summoning the parties for judgment, as per writ issued on the sixteenth day of the current month and year, in the proceedure of which action, each and every legal provision has been complied with.

1. Whereas, the plaintiffs filed certain questions appearing at folios 340 and 341 of the second record of the Roll of Evidence to be answered by Don Clemente de Fleurian, under indecisive oath (juramento indecisorio), who failed to appear upon the second citation without a good cause, notwithstanding the admonition addressed to him, and the seven questions contained in the interrogatory having been held re*vel*ant, it was ordered by the court that the same should be had in mind in due time for the purposes of Article 592 of the Law of Civil Proceedure.

2. Whereas, Don Clemente de Fleurian must, for that reason, be held to have confessed, first,—that Messrs. Laporte and Lombard, on selling to him the plantation "El Serrano", did so under the precise condition of organizing immediately an association with his father-in-law, Mr. Souffront, and with Dr. Mazado, who subrogated themselves in the place of Sr. de Fleurian, and which, to cover the obligation of paying the price and of complying with the other conditions

of the contract of purchase and sale. Second,—that the vendors did not deliver to him any of the copies of the contract, but that the two copies were deposited with the notary of Anduze, Mr. Augusto Gervais, for the purpose of drafting the contract of association, which should not be carried into effect or into the refusal of Mr. Souffront who did not authorize him to use his name and bind his capital. Third,—that the instrument of sale which he has in his possession was obtained by him from that notary at his repeated supplications and those of Dr. Mazado, in order to have the same recorded at Limoges. Fourth,—that the action for the nullity of the contract having been brought before the civil court of Nimes, he was summoned to appear in due form, which said summons was served on his wife at Croignon, of which said summons he had knowledge. Fifth,—that having returned two months afterwards to this island, on the day following his arrival, he executed in Juana Diaz the
31 mortgage obligation in favor of don Fernando Labastide, without having any other title of ownership of the plantation "El Serrano" than that, the nullity of which is referred to herein. Sixth,—that on executing that mortgage *he knew* that he was piercing one of the conditions of the contract, according to which the credit of the vendors for the price of the sale was to enjoy preference for payment, and Seventh,—that the documents which are attached to the complaint are true and correct translations from the judgments rendered by the Superior Court of Nimes and of the Court of Cassation at Paris, in the action which was prosecuted against him for the nullity of the sale and in the criminal cause in the same matter, which penalty he served in the public jail at Alais,

3. Whereas, it appears fully proven in the record that don Clemente de Fleurian was the manager of the sugar cane plantation known by the name of "El Serrano" situated in the municipal district of Juana Diaz of this jurisdiction, and during the period of thirty-three months of his management he rendered after a tenacious resistance to the exhibition of the accounts, a statement of accounts, and after keeping fraudulent books of accounts. inasmuch as he appears as a creditor of the property for more than thirty-seven thousand francs, when his predecessor Sr. Souffront, that managed the same for the term of eighteen years, and during the last three the continues drought general throughout the Island took place and the emancipation of the slaves did away with net dividends for more than fifty-five thousand francs per annum.

4. Whereas, de Fleurian resisted cunningly and fraudulently to present the accounts, and in black tints painted to the owners of the property the precarious condition of this property; that he desired to have them arrive at an exasperated decision, in which he was successful, inducing them to enter into the contract
32 of sale for the said property.

5. Whereas, it has been shown without a scintilla of doubt (de una manera pal maria) that the owners of the plantation "El Serrano" executed a private contract of purchase and sale with de Fleurian, but, under the condition that the same should also be in favor of Dr. Mazade, one of the co-owners and the co-ownership

was to last until the total payment of the price, which was opposed by de Fleurian, who protested that Dr. Mazado could not appear with the double character of vendor and vendee, the difference between them having been terminated by the execution of two essential instruments of an indissoluble character, namely,—that of the sale and that of association, it being well understood that the contract of association was the condition *sine qua non* of the sale, de Fleurian confirming all of the foregoing in his letter of September fifteenth of eighteen hundred and seventy-nine, addressed to Don Luis Lafaye, a person who on his order was managing the property at that time; therefore, not having complied with the condition, the sale is null and void because of the principle of law *actus conditionales defecta conditieni nihil est* in consonance with the declaration of the Law 58 Part 5th, Title 5th, and the decisions of the Supreme Court, among others that of January eighth, eighteen hundred and seventy-four.

6. Whereas, it has also been proven in the same manner that de Fleurian deceived the owners of the property "El Serrano" on assuring them that Mr. Souffront was one of the members of the association subscribing seventy-five thousand francs to the Company, which induced the said owners, on account of the high opinion they had of Mr. Souffront, owing to his probity, intelligence and economy in his administration, for as stated in the textual words of Messrs. Souffront, "I am a stranger to everything said and done by de Fleurian," deceit and fraud, which is the origin of
33 the contract and which makes it void. (Decision of the Supreme Court of May twentieth, eighteen hundred and sixty-four).

7. Whereas, deceit or fraud carries with it the defect of nullity and, therefore, had not the same been apparent on the part of de Fleurian as to the association that was to be made for the operation of the plantation "El Serrano", it is clear and evident that the vendors would not have given their consent to the sale, which was not perfected nor carried into effect, and which by the way, the document is nothing but a private contract, which is not acknowledged everywhere, nor has it been duly certified to, which is an indispensable requisite for its validity, in accordance with our laws.

8. Whereas, for the validity of a conditional sale such as is now in question, it is necessary to comply first with all the conditions stipulated for the same and it being an essential condition, the organization of that association, the immediate payment of fifty thousand francs to the acknowledged creditors; the payment of the balance of the price in the manner and under the terms stipulated and the prior right which they were to have over all other indebtedness, the rights agreed on by the private contracts, it is evident that de Fleurian not having complied with any one of said conditions he has no right to be acknowledged as the owner of the property, the ownership of which he never acquired nor could he encumber the same as he did encumber it in favor of Labastide.

9. Whereas, there is not any treaty between France and Spain

providing special rules as to the force and efficacy of the contracts executed and of judgments rendered in civil matters in any one of said nations as regards the other, and therefore, the gen-
34 eral principles of international law are applicable to the case, among which of said principles there is the principle of reciprocity, specially expressed as to the execution of judgments rendered by foreign courts in articles 951 and 952 of the law of Civil Procedure.

10. Whereas, according to the French legislation, real property, even if possessed by foreigners, is governed by the French Law (Article 3rd of the Civil Code) "A judicial mortgage does not ensue from a judgment rendered in a foreign country except when such judgment has been declared executory by a French court" (Paragraph 4 of Article 2123); "contracts entered into in a foreign country and acts executed before foreign officers cannot produce mortgage on property in France" (Article 2128); "the said acts and judgments are not subject to execution in France except in the manner and in the cases provided by Articles 2123 and 2128 of the Civil Code" (Article 546 of the Code of Procedure).

11. Whereas, according to the general interpretation in France as to the aforesaid provisions of its legislation, as well as to Article 14 of the Civil Code, the acts and judgments rendered by foreign courts are subject to revision and new discussion before the French Courts, and that in that respect and on the principle of reciprocity the final judgment rendered by the French courts, to which reference has been made in this action by the plaintiff, cannot produce the force and effect of res judicata as to a decision of the questions which are being ventilated in the same, especially when the same have not had the execuatur of the Supreme Court of Justice in the form provided by Article 954 and subsequent Articles of the said Law of Civil Procedure.

12. Whereas, according to the principle of private international law, sanctioned by the Supreme Court of Justice in several opinions, the efficacy of the acts or contracts affecting directly real
35 property, are governed by the royal statute or namely, by the laws of the country where the real property is situated, and therefore, as the question in this suit is in regard to a property situated in a Spanish territory, the questions relating to the nullity of validity of the title to the said property, and of the mortgage put on the same, should be ventilated or decided in accordance with the Spanish laws. *Locus regit actum.*

13. Whereas, it is an admitted legal doctrine sanctioned by the constant jurisprudence of the courts of justice that the contract of purchase and sale, even though it refer to real property, becomes perfect by the consent of the parties in the thing and to the price, without the necessity of reducing it to a public instrument, unless otherwise provided by law or by the will of the parties, it is evident that in the contract of purchase and sale of "El Serrano" circumstances of such nature have mediated that carry to the mind the knowledge of the deceit used by Don Clemente de Fleurian to wrest the consent from the owners of the property to dispose

of same, and therefore that in the said contract there is lacking the first and most essential requisite for the perfection and efficacy of contracts by consent.

14. Whereas, such conviction arises mainly from the tenacious and constant desire of Don Clemente de Fleurian to conceal the accounts that he was keeping of the management of "El Serrano"; from his correspondence perfectly proven in the records; of the constant acknowledgment on the part of de Fleurian as to the essential condition of the sale, or namely, the association with Dr. Mazado and with his father in law, Sr. Souffront, which appears from his own correspondence to the fifteenth of October, eighteen hundred and seventy-nine, and which is shown by other data up to the thirty-first of the *saem.* month; and from the sudden change in no way explained ever since that day, attributing to him-
36 self the exclusive ownership of the property as if he had never made any reference to association; from the fact which comes to perfect the evidence of his deceitful intention of mortgaging the property to Labastide on the day following his arrival at Porto Rico, or namely, on the eighteenth day of February eighteen hundred and eighty, when, at lea-t, since the twenty-sixth day of November next preceding he knew of the citation and summons with which he had been served for the nullity of the contract of private sale; from his own hurry in encumbering the thing in litigation, knowing, as appears from his letters, that in the possession of the consular agent of his nation at Ponce was the order for the service of the citations and summons on his own person, and he was so notified the day after, as stated by don Fernando Labastide in his replication; from the cl-uses of the same contract of mortgage, wherein the term of two months was fixed for the payment of the indebtedness of three hundred, I mean of thirty-seven thousand and odd pesos, the source and legitimacy of which are not shown, and both contracting parties, residents of Juana Diaz, submit themselves to the far jurisdiction of San German, from all the steps taken by and from all proceedings of de Fleurian, whether in France or in Porto Rico, and his default in judicial orders, and, lastly, from the lack of evidence on behalf of the defendants to attack and refute all these facts and precedents injurious to their case.

15. Whereas, therefore, the private contract signed in Anduze on the ninth day of October, eighteen hundred and seventy-nine is radically null and void because of the deceit which vitiates the consent given by the owners of the plantation "El Serrano" for the sale of this property to don Clemente de Fleurian, a consent which was wrested by the latter by means of maneuvers and fallacious
37 promises, without which the former would not have given their consent to transfer in his favor the aforesaid real property.

16. Whereas, in addition to these circumstances, and even though the contract should be considered perfect, there is no doubt that it was not carried into effect, and therefore that don Clemente de Fleurian did not get to acquire the right of ownership to that prop-

erty because he did not even enter into possession as the owner thereof, nor can it even be maintained that there was the symbolic tradition of the thing consisting in the delivery of the titles to the property, for it appears proven by the records that the copy of the contract of purchase and sale which he had and recorded at Limoges was not delivered to him by the vendors, but by the old notary Don Augusto Gervais who had received it from them in trust for the drafting of the contract of association which was to be simultaneous with the sale, and from the possession of whom de Fleurian succeeded in obtaining it, owing to his repeated requests under false pretenses.

17. Whereas, as regards the mortgage obligation placed on the property "El Serrane" in favor of don Fernando Labastide that Don Clemente de Fleurian not having a legal title of dominio to that property, not only for the radical defect of nullity, which affected it from its origin, but also because he never obtained the possession of the same as to its owner, which is an indispensable requisite in accordance with the legislation prior to the mortgage law now in force for the acquisition of property, it is evident that he could not transfer nor encumber the same in any manner, and that if he did so in favor of Labastide, the same is null and void and can have no effect to the detriment of the two owners of the property who did not finally transfer to de Fleurian their right of ownership, (dominio).

18. Whereas, there is the further reason of nullity of the
38 mortgage, the fact that the same was executed by de Fleurian after he had been cited and summoned by the Civil Court of Nimes in the action brought against him by the vendors of "El Serrano" for the nullity of the contract of sale, and when he had perfect knowledge of the said citation, for which reason the said mortgage should be considered as null and void in accordance with the laws, which declare as null and void the transfer of the thing in litigation, a condition which must attach to the plantation "Serrano" from the amount that action was brought against Don Clemente de Fleurian by the vendors as to the validity of the contract of sale, and the said action was notified in due form by the court to the jurisdiction of which the contracting parties had expressly submitted.

19. Whereas, the registration of that property in the registry of property does not make valid the acts or contracts which may be null and void in accordance with the laws, and therefore the nullity of the sale or of the principal obligation having been declared, it necessarily follows that of the mortgage as accessory thereto, and the cancellation of said mortgage should be decreed because that which is vitiated at the beginning must also be vitiated in its consequence.

20. Whereas, the nullity of the contracts of sale and of mortgage having been affirmed, which was the first prayer in the complaint, no judgment should be rendered as to the rescission of the same contracts, solicited subsequently by the same plaintiffs in case that the nullity should not be declared pertinent.

21. Whereas, from the precedents set forth in the statement of facts (resultandes) in this judgment and the subsequent conduct observed in this action by the defendants Don Clemente de Fleurian

and Don Fernando Labastide, notice should be taken of the temerity with which they have acted, and therefore the said defendants should pay all the costs herein.

39 In view of the legal provisions cited herein as also laws 56 and 57, Title 5, 28, Title 11, and 49, Title 14, of Part V; 8, Title 19, Part VI and I, Title 16 Part VII. The decissions of the Supreme Court, among others, that of January twenty-ninth eighteen hundred and sixty-seven, January eleventh and May eighth, eighteen hundred and sixty nine and February seventh, eighteen hundred and seventy-five, and Article 592 of the Law of Civil Proceedure, and all others of general application;

I adjudge, that Don Clemente de Fleurian is held to have confessed to the questions propounded at folios 340 and 341 of the second record of the Roll of Evidence of the plaintiffs, I should declare and do declare also the nullity of the instrument of sale and of the instrument of mortgage of the sugar cane plantation called "El Serrano," the first of which was executed in the private contract in Anduze, France, dated October ninth, eighteen hundred and seventy-nine, between the plaintiffs and Don Clemente de Fleurian; and the second named at Juana Diaz before the notary Don Ramon Rodriguez, on the eighteen day of February, eighteen hundred and eighty, by Don Clemente de Fleurian and Don Fernando Labastide, in consequence of which it is ordered that after this decision shall have become final, the annotation of the said instrument of mortgage in the registry of property be cancelled, for which purpose the proper orders shall issue with the necessary excerpts addressed to the registrar of property for this district, taxing all costs against the defendants Don Clemente de Fleurin and Don Fernando Labastide. Thus, finally adjudging was pronounced, ordered and signed by the judge.

(Signed) MANUEL BECERRA.

Publication.

The preceding judgment was read and published by the acting judge of first instance, Don Manuel Becerra y Garate, in the

40 Audiencia this day, the twenty-sixth of October, eighteen hundred and eighty-nine. I certify. Erased-dolo-situación-diez-e-Interlined-han-reconocide-no-all good. Struck out.-á a-no good. (signed) Carlos J. Chardon. Fees: 16 pesos 50 centavos."

That thereafter an appeal was prosecuted from the said judgment by the defendant Labastide to the Supreme Court of Justice of Porto Rico, and that the said appeal in said cause was fully heard and considered by the said Supreme Court of Porto Rico, and, to wit, on the 28th day of January, 1891, the said Supreme Court of Porto Rico rendered its judgment and decision on said appeal, which said judgment and decision was in the words and figures as follows, to wit:

"Attorney don Eduardo Rodeyro Garea, Official Scrivner of the Audiencia Territorial of Porto Rico,

"Certify: That by the Court of Justice there has been rendered the following judgment, No. 3:

In the City of San Juan Bautista, of Puerto Rico, on the 28th day of January, 1891, in this declarative suit of greater import, prosecuted by and between certain parties on the one hand Daniel Casimero, Doña Amelia and Doña Agatha Laporte and Don José Simon Armando Lombard, domiciled in the Republic of France and being property owners, represented by solicitor Don José Rossy y Guerra, and directed by the attorney Don José S. Quiñones; and on the other hand Don Clemente de Fleurian, who is in default, and Don Fernando Labastide, both domiciled in the city of Ponce, the last one being represented by the solicitor Don José Palacios and directed by the attorney Don Hilario Cuevillas concerning the nullity of a contract of sale of the plantation "Serrano," and nullity also of a mortgage document which is pending before the court by virtue of an appeal interposed by the defendant
41 Labastide against judgment rendered by the Judge of Ponce, under date of October 26th, last past, which judgment declares null the instrument of sale and the mortgage of the cane plantation named "Serrano," the first instrument being executed in a private contract at Anduze, France, dated October 9th, 1897, by and between the plaintiffs and Don Clemente de Fleurian, and the second document having been executed at Juana Diaz before the Notary Don Ramó n Rodriguez on the 18th day of February, 1860 (1880) by and between Don Clemente de Fleurian and Don Fernando Labastide, which judgment ordered as a consequence that as soon as an execution could be had upon it, there should be cancelled the annotation of the former in the registry of property, for that purpose the proper warrant to be issued with all the costs to be paid by the defendants Don Clemente de Fleurian and Don Fernando Labasride, and Mr. Justice Don José de Armas y Jimenez being appointed to write the opinion of the court.

Accepting the findings of fact (resultandes) of the judgment appealed from, with the exception of the 7th:

Whereas, the suit being opened for the purpose of taking evidence and the presentation of proofs, the representatives of the plaintiffs petitioned within the three days following the service of notice upon them of the order that there be conceded to them the extraordinary period for the taking of evidence so that they might take the testimony which they proposed and which should have been taken in the City of Nimes, and three days concerning this petition being granted to the defendants for the filing of exceptions and the said time having expired without their having filed any such exceptions, the said extraordinary period for proofs was granted for the time of six months, which should run together and contemporaneously with the ordinary period, and there having been practiced within that
42 time the taking of the evidence proposed by the plaintiffs, but not so with that (evidence) proposed by and permitted to

Labasride, who has not made return of the warrants which were delivered to him for the purpose of taking of such testimony;

Whereas, moreover, the complaint having been filed by the Solicitor Don Luis Gautier in the name and representation of Don David Casimire, Doña Emila and Doña Agatha Laporte and Don José Simo-n Adrian Armando Lombard, asking that there be declared null, or, in any event rescinded, the private contract of sale of the hacienda "Serrano," executed at Anduze, France, October 9th, 1879, and null in every case, the mortgage obligation imposed upon the aforesaid plantation by Don Clemente de Fleurian in favor of don Fernando Labastide at the town of Juana Diaz in this Island, on the 18th day of February, 1880, with other claims, which in the prayer of the same (complaint) are expressed; there was annexed to the complaint, besides the prayer which accredited the representative capacity of the solicitor, a copy of the aforesaid contract of sale translated by the official interpreter, Don Luis Toro; a translation made by the Office for the translation of Languages of the Minister of State, properly authenticated and legalized, of the judgment rendered by the Superior Tribunal of Appeals of Nimes, France, on the 24th of March, 1885, in a suit prosecuted in said city against Don Clemente de Fleurian by the sellers of the plantation "Serrano" concerning the nullity of the private contract of sale of said plantation executed at Anduze on the 9th of October, 1879, by which, after the verious incidents and dilatory pleas presented by de Fleurian had been resolved, there was confirmed the judgment rendered by the Civil Court of that City, which declared null, as being touched with fraud and wrong the aforesaid contract, and sustained the owners of said plantation to the ownership, domain and
43 possession of the same; another translation was also made by the Office for the Translation of Languages, and with the same formalities, of the judgment of the 17th of May, 1886, of the Court of Cassation of Paris, by which judgment it was declared that there was no ground for the appeal taken by de Fleurian against the aforesaid judgment of the Court of Appeals of Nimes, dated March 24th, 1885; another translation made by the same Office for the Translation of Languages, authenticated and legalized also in proper form, of another judgment pronounced by the Correctional Department of the Superior Court of Appeals of the city of Nimes on the 2nd of August, 1884, in the prosecution before the correctional Tribunal of Alais, of Don Clemente de Fleurian, by which judgment, in diciding the appeal taken by him against the sentence of the aforesaid court on the 28th of March, 1884, and which condemned him to the penalty of three years in prison, fine and payment of costs for swindle and abuse of confidence, the said court condemned de Fleurian to suffer one year's imprisonment and to pay the fine of 1,500 francs and costs, on account of two of the counts of swindle of which he was accused, acquitting him of the others, and one of the counts of swindle on which he was convicted, consisted in the fraudulent representations employed by de Fleurian for the purpose of obtaining the aforesaid contract of sale of the plantation "Serrano," dated October 9th, 1879; and lastly, an un-

official copy of the document of sale of said plantation, executed at Ponce on the 16th day of October, 1883, in favor of Don Juan Forgas and José Gallart by David Laporte, on his own account and as attorney in fact of Doña Emelia and Doña Agatha and Don Simón Adrian Armando Lombard, in which judgment there is set
44 forth that the sale is made and executed free from all burdens, the sellers being responsible and answering for all the responsabilities or burdens which may rest or press upon the aforesaid plantation so sold, documents the authenticity or correctness of which have not been expressly impugned by the defendants in the Court of First Instance, and moreover, the defendant Labastide, recognizing and admitting in his answer to the complaint, the private document of sale of the plantation "Serrano," the nullity of which is herein treated of;

Whereas, in the criminal prosecution, which at the instance of the plaintiffs was followed in this Island against Don Clemente de Fleurian and Don Fernando Labastide for fraudulently obtaining of the 36,811 pesos referred to by the mortgage document of the plantation "Serrano," judgment was rendered by the Juzgade of Ponce, which was confirmed by this Tribunal, acquitting the defendants because the facts proven did not constitute a crime, and there being set forth besides in said judgment that the swindle (estafa) did not exist because de Fleurian had a title of property of the aforesaid plantation, and until same was declared null by final judgment, he could lease or mortgage said plantation;

Whereas, final judgment having been rendered in these records at the instance of the plaintiffs, Don Clemente de Fleurian was personally notified of the same and consented to it, and the appeal taken by Labastide being freely admitted, and in both effects of record were forwarded to this Superior Court, where the parties entered their appearance within the proper time; and the Relator having returned said records with the proper statement (apuntamiento), they were delivered to the appellant for his study, who returned them, proposing certain proofs, which proposal was refused, and the amendments, changes and additions in the statement
45 (apuntamiento) proposed by the appellant being made, the records were ordered to be brought on for hearing with the proper citations of the parties, at which hearing there were present the attorneys and solicitors for both parties;

Whereas, the attorney for the appellant at a hearing noted his exception of — on account of the refusal of the proof which he had solicited at second instance, and he argued, among other reasons, the exception of res judicata, basing said exception upon the alleged fact that the question which was being debated, had been decided by virtue of a prosecution against the defendants on account of swindle (estafa) and concerning which reference has heretofore been made, which arguments and reasons were opposed by the other side;

Whereas, in this suit there have been observed all the rules and laws of proceedure; accepting the findings of law, (considerandos) 1, 2, 9, 10, 11, 13, to 19 and the 21st of the judgment appealed from.

Considering, that according to the principle of private International Law sanctioned by the Supreme Court of Justice in various judgments, the efficacy of the acts or contracts which affect directly real property, are governed by the law of the place where the property is situated, and therefore, as in this suit, we are dealing with a plantation situated in Spanish Territory, the questions concerning the nullity or validity of the title of said plantation and of the mortgage imposed thereon, should be considered and resolved according to Spanish laws;

Considering, that from the records there appears evident and in a plain manner the fraud employed by de Fleurian in obtaining the contract of sale of the plantation "Serrano", even to the point that had he not employed the artifices of which he availed himself in order to surprise the consent of the sellers, he never would
46 have obtained said consent, and these artifices consisted principally, besides those set forth in the "Considerandes", hereby accepted, of the trial court, in the guarantee which he offered to constitute immediately a partnership with Dr. Mazade, the husband of one of the sellers, and his father-in-law Don Adolfo Souffront, whom he would subrogate in his place for the payment of the purchase price and the fulfillment of all the other conditions of the purchase and sale, and lastly giving them to understand falsely that he was authorized to treat in his name and to bind him to invest in the partnership 75,000 francs with which to defer the first expenses or costs, with all of which he succeeded in surprising the consent of the sellers on account of the great confidence with which Mr. Souffront inspired them, and with whose honor and assiduity they were well acquainted, as he had formerly been manager of said plantation "Serrano" and besides he also representing to them that as Dr. Mazade could not appear in the same document as seller and buyer, it was better that he should execute in a separate instrument the contract of sale to the partnership, as in fact was done, he later succeeding, by his repeated requests and those of his partner Dr. Mazade, who believed him to be acting in good faith, and under false assimilated pretexts that they wanted to put it on record at Limoges, where he could do it more economically on account of his relations with the recorder, which he did not do, however, until three months later when he was preparing to return to this Island, in obtaining possession of the duplicate copy of the contract of sale of the plantation "Serrano" which had been left in the keeping of the Notary of Anduze, Señor Gervais, so that the document of the partnership might be drawn up;

Considering, that though it may be true that the judgment rendered by the French Tribunals declaring null and of no
47 effect the contract of sale of the plantation "Serrano," dated October 9th, 1879, as being touched with fraud, and also condemning de Fleurian to correctional imprisonment on account of the swindle springing from said fraud, did not have in Spain sufficient virtue upon which to render execution, nor did they have the effect of res judicata. Yet, at the same time, they cannot but at least be accepted as evidence or means of proof in force that refer to acts that took place in France among citizens of said country,

and above all, when said acts are found to be confirmed by the evidence presented at First Instance in these records, at the proper time, especially by the testimony of the Notary Gervais, Don Lucas Amadeo and Don Luis Fafaye, and by the interrogatories proposed to the defendant de Fleurian, which have been taken as confessed, and the correspondence and incorrect accounts kept by this last person, as the result of which, when taken together as evidence, there is acquired intimate conviction of the fraud which vitiates the aforesaid contract of sale by the arts and artifices employed by de Fleurian to obtain it in the form stated by the aforesaid Tribunals of France;

Considering, that even though it be presumed that there was no fraud in the contract of sale of the plantation "Serrano", nevertheless there results that the sale was executed under the express condition that de Fleurian would immediately constitute or enter into a partnership with Dr. Mazade and his father-in-law Mr. Souffront, who was to be subrogated in the place of the purchaser until the title and final payment of the purchase price, because de Fleurian did not inspire the sellers with sufficient confidence, and said express condition not having been fulfilled or complied with and the efficacy of the sale being made to depend upon, this, it is evident that said sale was not perfected, and therefore could not produce ef-
48 fective legal results, among which is the first and most essential of transferring to the purchaser the domain of the thing sold;

Considering, that the fact that Don Clemente de Fleurian has consented to the judgment of the Court of First Instance without having taken any step or appeal against the same, notwithstanding that he was personally notified of said judgment, also contributed to administer most plainly the fraud and the nullity of the contract of purchase and sale in which de Fleurian took part as purchaser, and the validity of which he was the party most interested in sustaining;

Considering, that therefore the contract of sale of the plantation "Serrano", dated October 9th, 1879, is null and void, it follows therefore that the contract of mortgage executed in virtue of a contract on the 18th of February, 1880, is also void and null, whether it be on account of this motive and reason, or because it was executed in virtue of a contract made and executed in a foreign land which had not been made or raised to a public document nor recorded in the registry of property at Ponce, where the property was situated, as is required by laws 2 and 3, title 16, Book 10, of the "Novisima Recopilación" and the Royal Decree of May 23rd, 1845, covering said matters, as at the date of said mortgage there had not yet been made promulgation of the mortgage law, and therefore said mortgage was recorded without the intervention of a legitimate or legal title;

Considering, that besides these reasons, which by themselves invalidate the mortgage obligation aforesaid, it is also null because it was executed in contravention of the clause contained in the contract of sale of October 9, 1879, which recognized the preference of the rights of the sellers of the plantation "Serrano" above all the debts

of de Fleurian, which though it be true, did not absolutely
49 prohibit him from mortgaging, yet at the same time it imposed upon him the duty of doing so, saving the preferential rights of the sellers, which was not done. On the contrary, there appearing the mortgage, which to-day being made effective with the stipulated interest, Labstide would collect the sum total of his credit, when the value of the plantation would not be sufficient to cover the same, whilst the sellers would not have collected the smallest part of theirs, inasmuch as de Fleurian has not paid them any part of the purchase price agreed upon, and this contrary to what is especially stipulated in the contract, which is a law which should be respected and fulfilled by the contracting parties;

Considering, that although Don Fernando Labasride was not a party to the contract of sale of the plantation "Serrano", yet he cannot allege ignorance of its terms, inasmuch as there is set forth in the mortgage instrument that said contract was had at sight at the time of the execution of said mortgage, and therefore if he accepted the mortgage, he did so willingly and with knowledge of the clause which took away from de Fleurian any faculty of transferring to a third person any right concerning said plantation to the prejudice of the preference recognized in favor of the sellers;

Considering, that another reason for the nullity of the mortgage consists in its having been recorded 18 days after its execution, whilst the Royal Warrant dated August 25th, 1802, in force on this point, when it ordered that there should be observed laws 2 and 3 of the "Novísima Recopilación" also specially ordered that there be observed what was provided in said Royal Warrant, and in which there is fixed the period of six days for the recording of mortgages when they are executed at the city of registry, and one day more for every four leagues when they are executed at a distant point,
50 from all of which it is inferred that the recording should have been done within seven days, inasmuch as the town of Juana Diaz, where it was executed, is scarcely two leagues distant from the city of registry of property, and it should not have been done at the 18th day, as it was in fact done, therefore patently violating the aforesaid Royal Order;

Considering, that in respect to the defendants, the res adjudicata advanced by the appellant at the time of the hearing, and which is based upon the judgment in the second prosecution for swindle against the defendants, it cannot be considered as well taken because it was not established in time, inasmuch as it should have been proposed at the time of answering the complaint, or, at the most, in the pleading of "Duplica," in accordance with Articles 541, 543 and 547 of the Law of Civil Procedure. And far from this said to be recognized in the first point of law contained in his "Duplica" "That it was not to be doubted that the judgment (Ejecutoria) that had been presented, and to which reference was made, did not absolutely prejudge the question which was being debated in the suit, for if it were, they would have presented it as a peremptory exception with the character of res adjudicata";

Considering, that even though it be supposed that said exception

of res adjudicata was presented in time, it cannot be changed to be well taken inasmuch as the judgment rendered in the cause acquitting the defendants for the reason that the facts proven did not constitute a crime, is not an obstacle to a decision in a civil sphere touching the validity and efficacy of the document according to precedents established by the Supreme Court of Justice in the various different judgments, among others that of March 5th and April 4th, 1888; and the principle contained in Article 116 of the Law of Civil Procedure, that the extention of the penal
51 action does not carry with it that of the civil right unless it should be established and have been declared by "firm" judgment that the act from which the civil action would have sprung, did not exist, a reason having much greater weight, because in the judgment upon which the exception is taken, the document is considered as eficacious whilst it is not declared null by final (unappealable) decree, from which it is logically inferred that notwithstanding that judgment, the validity of the document cannot be civilly attacked;

Considering, that with regard to similation of the mortgage credit, whilst there may be grave motives to cause doubt touching its genuineness, this similation has not been proven in a clear and evident manner, and with regard to re-cession, it is advanced in a subsidiary manner, inasmuch as the contract of sale and the mortgage have been declared null for the reasons already expressed, there is no need to press upon this point inasmuch as it was advanced solely in case the contract be not declared null.

In accordance with the legal precedents and dispositions above cited and those contained in the judgment appealed from;

We decree that we should confirm, and we do hereby confirm the aforesaid judgment appealed from without any special condemnation of costs in either of the two courts.

Thus by this our judgment, do we pronounce, order and sign.

(Signed) JOSÉ MARIA LARAZABAL.
(Signed) JOSÉ DE ARMAS.
(Signed) RAMON A DE SOTO.

Publication.

The preceding judgment was read and published by the Justice writing the opinion of the Court, Don José de Armas y Jimenez, in the session of this day, the 29th of January, 1891.

(Signed) EDUARDO RODEYRO.

52 This agrees with the original document which exists in book of the Court, maker No. 3 in turn, to which I refer Porto Rico, January 29th, 1891.

(Corrections.)

(Signed) O. K., JOSÉ LARAZABAL.
(Signed) EDUARDO RODEYRO.

That thereafter an appeal was prayed from the said decision of the Supreme Court of Porto Rico in said cause to the Supreme Court of Spain, but these defendants allege that by reason of the failure of the said Labastide, who was the only party appearing in said appellate proceedings, to appear and prosecute the said appeal in the Supreme Court of Spain, the same was dismissed and the said decission of the Supreme Court of Porto Rico became firm and fixed, and is still in full force and effect.

And the defendants further allege that the said decission of the said court of first in-tance of Ponce, which said decission was affirmed by the said decission of the said Supreme Court of Porto Rico, was a full, complete and final determination of all the matters and things relating to the alleged title of the said Clemente de Fleurian in or to the said premises described in plaintiff's complaint herein, and these defendants present the same as a bar and res judicata to the further prosecution of the proceedings under the complaint herein. That in pursuance of the said decissions of the court of first instance of Ponce and of the Supreme Court of Porto Rico, hereinbefore set forth, the proper orders were issued and the registration of the said mortgage from the said Clemente de Fleurian to the said Labastide was duly cancelled and
53 annulled in the registry of property of Ponce, and that the said decision of the court of first instance of Ponce and the said decision of the Supreme Court of Porto Rico, confirming the same, have been carried out as to all matters and things which were ordered and directed therein and thereby.

Wherefore, these defendants allege, in view of the said decisions of the said courts hereinbefore contained, that they should be dismissed and discharged with their costs in this behalf expended.

And for a fourth and further answer and defense to the said complaint of plaintiffs, these defendants allege that heretofore, and prior to the ninth day of October, 1879, one David Laporte and others were the owners of the premises described in the plaintiffs' complaint herein and known as the hacienda "Serrano", And that on the ninth day of October, 1879, there was a private contract of sale executed by the said owners to one Clemente de Fleurian, being the party through whom the plaintiffs in this action claim title to the premises in controversy. But these defendants allege that the said contract of sale was null and void and of no effect whatsoever, owing to the fraud, misrepresentation and wrongful conduct of the said Clemente de Fleurian in connection therewith. That the said contract of sale was never delivered to the said Fleurian by the said grantors, but was fraudulently procured by the said Fleurian from the notary who had possession of the same for the purpose of preparing certain other contracts which it was proposed should be a part of the said transaction of sale of said lands. That the said Fleurian never complied with any of the terms or conditions of the proposed sale or of the said contract so executed, and that the said Laporte and others, the owners of said premises, instituted an action in the civil tribunal of Nimes in the Republic
54 of France, the same being a court having full jurisdiction of the parties to said action and the subject matter thereof,

for the purpose of declaring that the said contract of sale was null and void and of no effect as being vitiated by deceit and fraud, and to maintain the said Laporte and the other owners of said property in their legitimate possession and ownership thereof. That such proceedings were had in said action so instituted as aforesaid, as that a final judgment was rendered therein by the said civil tribunal of Nimes on the tenth day of May, 1880, a portion of said judgment being in the following language, to wit:

"And as regards to fact, in the case pending between the aforementioned parties, the civil tribunal of Nimes has rendered, under date of May tenth, eighteen hundred and eighty, a judgment, the final part of which is as follows: For these reasons the court, after hearing the solicitor for Armando Lombard and spouses, doing justice to the complaint by default, because of the failure to appear on the part of Fleurian and the spouses Mazade, or anybody for them, although summoned in a regular way some months ago, declares them in default, and for benefit thereunder, the Court revokes and makes null the instrument under private signature executed in Anduze, the ninth day of October, eighteen hundred and seventy-nine, recorded in Limoges, the third day of January, eighteen hundred and eighty, the said instrument being vitiated by deceit and fraud, and therefore should produce no effect against the parties signing the same, maintains the owners of the plantation "Serrano" in their legitimate possession and ownership of their property, and sentences the defendants to pay the costs of this action."

That thereafter the said judgment and decision having been appealed from the said civil tribunal of Nimes to the court of appeals of Nimes, being the proper appellate tribunal for
55 hearing such appeal, and such proceedings were had in connection with said appeal that on March 24th, 1885, the said court of appeals rendered its final judgment in the matter of said appeal, in and by which said judgment it confirmed and affirmed the judgment of the said civil tribunal of Nimes hereinbefore set forth.

That thereafter the said Fleurian attempted to appeal, or did appeal the said judgment of the said court of appeals of Nimes to the court of cassation in Paris, France, the same being the court to which appeals under certain circumstances are allowed from the said court of appeals of Nimes. And that the said court of cassation of Paris on May, 17, 1886, rendered its judgment and decision in the matter of said appeal, denying the same and affirming the judgment of the said court of appeals of Nimes, which said judgment has always since said date been, and now is in full force and effect.

And these defendants allege that since the year 1879, the title of the said premises described in the complaint and known as the hacienda "Serrano, have by mesne conveyances through various parties come to and been vested in these defendants, from the said Laporte and the other owners thereof. And that these defendants are privy to the said title of the said Laporte and others, and these defendants say and allege that the said judgment of the said civil

court of Nimes, which was so affirmed by the judgment of the said court of appeals of Nimes, was a final and full adjudication of the matter of the alleged title of the said Fleurian in said premises, and that the same constitutes, in law and equity, a bar to the further prosecution of any action on behalf of the said Fleurian or his successors or any claim respecting the title to said premises.

Wherefore these defendants say that the said plaintiffs
56 should not be permitted to further prosecute their said action in this behalf.

And for a fifth and further answer and defense to the complaint of plaintiffs filed herein, these defendants say and allege that heretofore, and on the first day of February, 1904, these same plaintiffs in this present action caused to be filed in their names as complainants, in this honorable court, their certain bill in equity directed against one José Gallart and others constituting what was known as the Sucesion of José Gallart. That in and by the said bill of complaint, the said complainants claimed the ownership of the premises involved in this action, to wit, the said hacienda "Serrano", as the heirs and successors of one Clemente de Fleurian, and that the said action was brought for the purpose, as shown by the prayer of said bill of complaint, of securing a decree from this honorable court declaring the said complainants to be owners of the said premises in dispute herein; also to have declared null and void and of no effect, a certain deed of the said premises from one Laporte and others to one José Gallart and Don Juan Forgas; and also to recover from the said succession of Gallart all of the proceeds and profits received from the said premises during the occupancy thereof by the said Gallart and his succession, up to the time of the bringing of the said action.

And these defendants allege that such proceedings were had in the said action in this honorable court that on the — day of ——, a final judgment in said action was rendered in the following language, to wit:

"On consideration of the demurrer to the bill of complaint herein, the same is sustained and this case is dismissed at the complainants' costs."

And defendants allege that the said decision was a final and
57 complete decision of the said cause, and that the said judgment stands firm and fixed in the records of this honorable court, and that the same has not been appealed from, nor has any step been taken for the review, reopening or reversal thereof. And these defendants allege that they are the owners and in possession of the said premises described in said complaint, by virtue of a conveyance thereof from the said succession of Gallart, the defendants in the said suit in equity herein referred to, and are in privity with the said defendants in said ownership, and that the said action and the decision of the court therein is a full and complete bar, both in law and in equity, to the prosecution of the matters and things alleged in the complaint herein. That this honorable court at the time of the rendition of its decision in the matter of the said bill in equity had full jurisdiction of the parties and the subject matter of the said

action. And these defendants allege that by virtue of the said decision, the said complaint herein should be dismissed and held for naught as a matter res adjudicata, and that these defendants be discharged hereof.

Wherefore the said defendants, having fully answered plaintiffs' complaint in the premises, pray to be hence dismissed with their costs and charges in this behalf expended.

(Signed) CHAS. HARTZEL,
M. RODRIGUEZ SERRA,
FRANCISCO PARRA CAPO,
Attorneys for Defendants.

And on the 1st day of February, 1907, came the plaintiffs by their attorney C. M. Boerman, Esqr. and filed in the Clerk's office of said court a demurrer to the answer herein and a motion to strike parts of said answer, which said demurrer and motion are as follows, to wit:

In the District Court of the United States for Porto Rico.

58 MARIA MARGARITA VOLCEY SOUFFRONT et al.,
Plaintiffs,
vs.
LA COMPAGNIE DES SUCRERIES DE PUERTO RICO et al., Defendants.

Demurrer to the Answer.

Now come the plaintiffs herein and demur to the third, fourth and fifth defences set out in the answer of the defendants herein, on the ground that the facts stated therein do not constitute a defence to the complaint.

C. M. BOERMAN,
Attorney for the Plaintiffs.

In the District Court of the United States for Porto Rico.

MARIA MARGARITA VOLCEY SOUFFRONT et al., Plaintiffs,
vs.
LA COMPAGNIE DES SUCRERIES DE PUERTO RICO et al., Defendants.

Motion to Strike Parts of the Answer.

Now come the plaintiffs in the above entitled cause and move this Honorable Court to strike the following parts of the answer:

First. That portion beginning with the word "judgment" on the line nine of page seven and ending with the word "centavos" on the line nine of page forty.

Second. That portion beginning with the word "attorney" on the line eighteen of page forty and ending with the word "Rodeyro" on line twelve of page fifty-four.

On the ground that said parts are matters of proof and do not need to be set out fully in the pleadings, and on the ground that they encumber the record and will prevent the parties from preparering the record for appeal if necessary, without unnecessary expense and cost.

C. M. BOERMAN,
Attorney for Plaintiffs.

And on the same day and year last aforesaid an entry was made upon the journal of Said court in said cause, which said entry
59 is as follows, to wit:

MARIA MARGARITA VOLCEY SOUFFRONT et al.
vs.
LA COMPAGNIE DES SUCRERIES DE P. R. et al.

Comes now C. M. Boerman, attorney for the plaintiffs, and files a demurrer to the answer and a motion to strike parts of the answer. Whereupon the motion to strike is heard and submitted, the demurrer to the answer is submitted without argument, attorney for the plaintiffs to file a brief on or before March 15, 1907. Decision on the motion to strike is reserved, to be passed upon at the same time as the demurrer.

And afterwards, to wit: June 1st, 1907, an opinion of this Court was filed, in said cause, which said opinion is as follows, to wit:

In the District Court of the United States for Porto Rico.

MARIE MARGARITA VOLCY SOUFFRONT, Widow of Fleurian; MARIA Elizabeth Odette Fleurian, and Maria Antoniette Ema Fleurian, Widow of Souffront,
vs.
LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE.

Opinion and Order.

This is a formal code complaint in ejectment, for the recovery of the possession of five hundred and four cuerdas of first class sugar cane land situated near Juana Diaz on the south shore of Porto Rico, or for damages in the sum of one hundred and fifty thousand dollars in lieu of recovery of premises and fifteen thousand dollars additional damages for the sugar crop of 1904-5 alleged to have been taken from the land by defendants.

It was filed in July, 1906. On August 11, 1906, counsel for defendant La Compagnie des Sucreries de Porto Rico, demurred on the ground that plaintiffs allege no possession in themselves or their ancestors, of the land in question, etc., and because the com-
60 plaint does not allege that at the time of the commencement of the action they were entitled to the possession. There-

after, on August 18, 1906, the same counsel demurred on behalf of defendant Erneste Maurice on the same grounds. After the filing of other papers, on January 22, 1907, an answer was filed consisting of sixty pages of closely written typewriter matter. On February 1, 1907, counsel for plaintiffs filed a motion to strike out more than nine-tenths of this answer, because it sets up matters of proof that need not be fully detailed in the pleadings, and for the reason that setting the same out in the pleadings encumbers the record, especially in case of appeal. On the same day, counsel for plaintiffs demurred to the third, fourth and fifth defences set up in the answer, on the ground that the facts stated therein do not constitute any defense to the complaint.

The cause is before us on the issues thus raised. On February 28, 1907, counsel for plaintiffs filed an eight page brief in support of his demurrer to parts of the answer. On March 16th thereafter, counsel for defendants filed a twenty-five page brief in opposition to the demurrer to the answer; and later, counsel for plaintiffs filed an additional six page reply brief.

We have gone to considerable trouble in going through this entire mass of papers and desire here to make a few statements for the guidance of counsel in this and other cases in the future. To properly plead, answer or demurrer is the right of every attorney in every court, but there is a presumption which follows the practice of law that counsel will not needlessly encumber the court's record or carelessly waste the court's time either in the filing of suits in extremely doubtful causes of action, or by the putting in of manifestly frivolous pleas, answers, demurrers, exceptions, motions to strike, etc. A thorough examination of the record here leads the court to believe that the facts out of which this alleged cause of action arises,
61 are as follows:

That prior to 1879, during the Spanish regime in Porto Rico, the land in question, which is a sugar cane plantation known as "Serrano," belonged to the head of a family by the name of La Porte, his being the common source of title of both these parties. That shortly thereafter the ancestor of these plaintiffs, one Clemente Fleurian, entered into some sort of a deal with this man La Porte, whereby the land was to be deeded to Fleurian, and a deed to that end was actually executed, but never delivered, it being left with a local notary until the whole trade should be finished. It appears though, that Fleurian went to this notary and got possession of the deed by some subterfuge and never paid any consideration for it and never carried out any of the rest of the trade. He then mortgaged the land to a co-conspirator, as it is claimed, named Labastide, and the latter instrument was put on record, although the deed to Fleurian is not of record to this day. And it is not stated how he managed to mortgage property to which he had no recorded title. When the La Porte family found out about this (the old man having died in the meantime), they brought a suit in France, all the parties it seems belonging in that country and being in Porto Rico only temporarily at times, and where it seems the contract for the whole deed was made; and after a hot legal contest in that country prose-

cuted to the highest court of the republic, secured the cancellation of the deed and the mortgage given under it in so far as a decree in a French court could do so as to land situated in Porto Rico, and in addition, prosecuted Fleurian criminally and sent him to prison in that country for a considerable term in punishment for the fraud. In the meantime, the heirs of this man La Porte sold the land to two persons named Forgas and Gallart and gave up the possession to them, and the latter thereafter conveyed and surrendered
62 possession thereof to the defendant corporation. It does not appear anywhere that this man Fleurian or his mortgagee ever had any possession of this land. The Laporte heirs when conveying to Forgas and Gallart, entered into a direct contract with them to pursue this litigation against the Fleurian family and this man Labastide until the property should be cleared from all cloud on the title under Porto Rican law, caused by their claim, and a large portion of the purchase price was withheld to insure its accomplishment. This the Laporte family did by bringing a suit in the court of first instance at Ponce against Fleurian and Labastide or their representatives, and prosecuting the same with uniform success to the Supreme Court of Porto Rico and to the Supreme Court of Spain where the defendants appealed it, the suit being finally dismissed on their motion on the default of the Fleurian in the latter court, leaving the Porto Rico Supreme Court decision in force. It appears from the answer that the defendant corporation transferred four hundred and eighty odd acres of the tract to the defendant Erneste Maurice, and as the concern in running a sugar plant and milling the sugar from all the sorrounding country, while it is none of our affair, the Court suspects that this transfer may have been made, and perhaps in good faith, to avoid the effect of the Act of Congress which prevents corporations ow-ing more than five hundred acres of land in this Island. The answer of the defendants further sets out that by themselves and their predecessors in interest they have been in the uninterrupted possession and enjoyment of this tract of land for more than twenty years last past.

It further appears that on February 1, 1904, these same plaintiffs as heirs of the said Clemente Fleurian, and presumably claiming under the fraudulent and now cancelled deed aforesaid, filed a bill in equity in this court, to quiet their title to the land in ques-
63 tion, but it appears from the record, although the papers are not before us, that the cause went out on general demurrer.

Thus it will be seen that if the land is the same,—and every thing in the record shows that it is—and if these plaintiffs are claiming the same, although never having had any possession thereof, as heirs of their husband and father under this fraudulent deed,—and every thing in the record seems to indicate that they do,—even though the present complaint is a formal one under the code, then the matter has been litigated and settled several times; and plaintiffs are absolutely without right of any kind or character in or to the land — question, and they are simply wasting the time of the court and annoying the defendants. The brief of defendants states that soon after the present suit was filed, he made an application to the court asking that plaintiffs in the interest of justice be forced to set out

in their complaint in some more definite way by what right they claim the land in question, and asserts that this application was resisted and the court denied it, and that for this reason he was forced to set up in full detail all of this matter in his answer. We have no distinct recollection, nor does the record show that we made such ruling, but if we did, it must have been on the theory that ordinarily plaintiffs have the right to file this sort of a formal complaint in ejectment under the code without setting up their source of title. However we feel so opposed to this sort of effort to waste the time of the court in useless attempts to keep up litigation, as that for the present we overrule plaintiffs' motion to strike, and their demurrers to the answer, and call upon them to file a replication within ten days or such longer period as they may, if at all, be entitled to, setting up the fact whether or not the answer is true in so far as it sets out the source of paintiffs' title and describes or
64 recites these proceedings in other courts regarding this property.

If it shall transpire that the answer has set up the real facts in the case, then, on the application of defendants, the action will be immediately dismissed at the cost of the plaintiffs; and the Court here intimates, that if it shall so develop that the answer has set up the real facts and defendants will at once file a bill to quiet their title and enjoin these plaintiffs, the Court will after due proof in the premises feel inclined to give it very favorable consideration.

And while speaking on the subject, we desire here to place on record as emphatically as may be, our disapproval of useless annoying and probably unfounded litigation. This matter appears to be res adjudicata beyond any question, and with all due consideration we submit that counsel for plaintiffs ought to be aware of that fact. His briefs evade the facts set up in the answer, and proceed to argue the law as to res adjudicata, estoppel, the right to successive writs or suits in ejectment, the non-barring of a higher suit by defeat in a suit of lower order, and many other immaterial matters.

In our opinion, the proceedings heretofore had both in the French courts and in the Spanish Porto Rican courts were equitable in character, as was the suit in this court, and unless the right under which plaintiffs claim, has arisen since, the matter is res adjudicata and they are barred. Let proper orders be entered, and notices issued hereunder.

B. S. RODEY, *Judge.*

And on the same day and year last aforesaid an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

No. 207.

MARIA M. VOLCEY SOUFFRONT
65 vs.
COMPAGNIE SUCRERIES DE PUERTO RICO.

The court hands down an opinion herein and in accordance therewith the plaintiffs' motion to strike and demur to the answer *are* overruled.

And afterwards, to wit: June 7th, 1907, an entry was made upon the Journal of said Court in said cause which said entry is as follows, to wit:

No. 207.

MARIA MARGARITA V. SOUFFRONT et al.
vs.
LA COMPAGNIE DE SUCRERIE-, ETC., et al.

Complainants herein are given ten additional days within which to file their replication.

And on June 22nd, 1907, the plaintiffs herein by their attorneys filed a replication in the Clerk's office of said Court in said cause, which said replication is as follows, to wit:

In the District Court of the United States for Porto Rico.

MARIA MARGARITA VOLCY SOUFFRONT, Widow of Fleurian; MARIA Elizabeth Odette Fleurian, and María Antoniette Ema Fleurian, Widow of Souffront, Plaintiff-,
vs.
LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE, Defendants.

Replication.

Now come the plaintiffs herein, in conformity with the order of the Court entered herein and make reply to the answer of the defendants as follows:

First. They deny that the defendants have ever had any
66 just title to the premises or that those from whom they derived title have possessed the premises in good faith or with just title.

Second. The Plaintiffs impugn the alleged prescription either of ten years or of twenty years.

Third. The plaintiffs deny the allegations in the answer that the ancestor Clemente de Fleurian has obtained the deed to the properties described in the complaint through fraud and they allege that he purchased the said properties in good faith and for valuable consideration and always was ready and the plaintiffs are ready to comply with all the conditions of the said deed of sale, and that said deed was delivered to him by the vendors and their agents.

Fourth. The plaintiffs admit that the judgment- mentioned in the answer as a third defense to the complaint have been rendered but the suits in which said judgments were rendered have been instituted against Clemente de Fleurian while he was insane and out of his mind and without any curator or guardian or committee of his person being named by the Court; and that the defendants herein

were neither parties nor privies to the said judgments and suits and appeals and therefore said judgments cannot bar this action.

Fifth. The plaintiffs admit that the judgment mentioned in the answer as a fourth defense to the complaint has been rendered but the plaintiffs state that the Court which rendered said judgment had no jurisdiction in the subject matter and said judgment being of a foreign court without jurisdiction is not binding, and the plaintiffs further allege that the defendants herein were neither parties nor privies to the said judgment and suit, and therefore said judgment is not a bar to this action.

Sixth. The Plaintiffs further replying say that the judgment or decree mentioned in the answer as a fifth defense to the complaint was rendered not upon the merits of the case and without any proof being taken, but only upon a demurrer to the complaint for want of equity and for laches, both purely equitable defenses available only in suits in equity, and the plaintiffs state that this decree is not a bar to this action.

67 Wherefore the plaintiffs pray judgment thereon.

BOERMAN & LLORENS,
Attorneys for Plaintiffs.

And on the same day and year last aforesaid an entry was made upon the Journal of said Court in said cause, which said entry is as follows:

Ponce. No. 207.

MARIA M. VOLCEY SOUFFRONT DE FLEURIAN et al.
vs.
LA COMPAGNIE DE SUCRERIES DE PORTO RICO et al.

Now come the plaintiffs by their attorneys Boerman & Llorens and file a replication to the answer in this cause, and upon consideration thereof it appears to come within the rule laid down in the Court's opinion on the demurrer to the answer of the defendants filed June 1st. Now, upon application by Hartzell and Rodriguez the attorneys of said defendants, the cause is dismissed at the cost of the plaintiffs to be taxed by the clerk, for which execution may issue.

Plaintiffs except to the dismissal hereof.

And on June 29th, 1907, an entry was made upon the Journal of said Court in said cause, which said entry is as follows, to wit:

MARIA M. VOLCEY SOUFFRONT
vs.
COMPAGNIE DES SUCRERIES DE PORTO RICO.

Upon application of C. M. Boerman, attorney for the plaintiff herein, the bond for cost on appeal is fixed at the sum of two hundred and fifty dollars.

And on February 17th, 1908, came the plaintiffs by their attorneys and filed in the Clerk's office of said court a petition for a writ of error, an assignment of errors and a bond for a writ of error, which said petition, assignment and bond are as follows, to wit:

Petition for a Writ of Error.

In the District Court of the United States for Porto Rico.

68 MARIA MARGARITA VOLCEY SOUFFRONT, Widow of Fleurian; Maria Elizabeth Odette Fleurian, and Maria Antoniette Ema Fleurian, Widow of Souffront,

VS.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE.

María Margarita Volcy Souffront, widow of Fleurian; María Elizabeth Odette Fleurian and María Antoinette Ema Fleurian, widow of Souffront, plaintiffs in the above entitled cause, feeling themselves aggrieved by the judgment entered on the 22nd day of June, 1907 come now by Charles M. Boerman their attorney and petition said Court for an order allowing said plaintiffs to prosecute a writ of error to the Honorable The Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided.

And your petitioners will ever pray.

C. M. BOERMAN,
Attorney for Plaintiffs.

Assignment of Errors.

In the District Court of the United States for Porto Rico.

MARIA MARGARITA VOLCY SOUFFRONT, Widow of Fleurian; MARIA Elizabeth Odette Fleurian, and María Antoniette Ema Fleurian, Widow of Souffront,

VS.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE.

Come now the plaintiffs and file the following assignment of errors:

69 1. The United States District Court for Porto Rico which entered the judgment in the above entitled cause erred in overruling the demurrer interposed by the plaintiffs in the third defense set up in the answer.

2. The Court erred in overruling the demurrer of the plaintiffs to the fourth defense set up in the answer.

3. The Court erred in overruling the demurrer of the plaintiffs to the fifth defense set up in the answer.

4. The Court erred in rendering judgment against the plaintiffs in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and facts as stated in the pleadings in said Court.

Wherefore the said plaintiffs in error pray that the judgment of said Court be reversed and such directions be given that full force and efficacy may inure to the plaintiffs by reason of the defenses set up in their demurrers filed in said court.

C. M. BOERMAN,
Attorney for Plaintiffs.

Bond for a Writ of Error.

In the District Court of the United States for Porto Rico.

MARIA MARGARITA VOLCY SOUFFRONT, Widow of Fleurian; MARIA Elizabeth Odette Fleurian, and María Antoniette Ema Fleurian, Widow of Souffront,

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE.

Know all men by these presents that we, María Margarita Volcy Souffront, Widow of Fleurian as principals, and Thomas E. Lee of the City of Ponce and Gabriel Ponzol of the City of Coamo as
70 sureties, are held and firmly bound unto la Compagnie des Sucreries de Porto Rico and Erneste Maurice in the full and just sum of two hundred and fifty dollars, to be paid to the said La Compagnie des Sucreries de Porto Rico and Erneste Maurice, their attorneys, executors, administrators, or assigns to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th of February nineteen hundred and eight.

Whereas, lately at a session of the United States District Court for Porto Rico in a suit pending in said court between María Margarita Volcy Souffront, widow of Fleurian; María Elizabeth Odette Fleurian and María Antoniette Ema Fleurian, widow of Souffront, plaintiffs and La Compagnie des Sucreries de Porto Rico and Erneste Maurice, defendants, a final judgment was rendered against the said plaintiffs and the said plaintiffs having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said La Compagnie des Sucreries de Porto Rico and Erneste Maurice is about to be issued, citing and admonishing them to be and appear at the Supreme Court to be holden at the City of Washington.

Now, the condition of the above obligation is such, that if the said María Margarita Volcy Souffront, widow of Fleurian; María Elizabeth Odette Fleurian and María Antoniette Ema Fleurian, widow of Souffront shall prosecute their writ of error to effect and shall

answer all damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

(Sig.) C. VDA. DE FLEURIAN.
T. E. LEE.
G. PONZOL.

Acknowledged before me this 17 day of February, 1908.

JOHN L. GAY,
Clerk U. S. District Court of Porto Rico,
By A. AGUAYO,
Deputy Clerk.

T. E. Lee under oath says that he is a resident of Porto
71 Rico and is worth the sum of five hundred dollars over and above his legal liabilities.

(Sig.) T. E. LEE.

Sworn to before me this 17 February 1908?

(Sig.) JOHN L. GAY,
Clerk U. S. District Court of Porto Rico,
By A. AGUAYO,
Deputy Clerk.

G. Ponzol being under oath says that he is a resident of Porto Rico and is worth the sum of five hundred dollars over and above his legal liabilities.

(Sig.) G. PONZOL.

Sworn to before me this 17th of February 1908.

JOHN L. GAY,
Clerk U. S. District Court of Porto Rico,
By A. AGUAYO,
Deputy Clerk.

Approved this 3/4/08.

B. S. RODEY, *Judge.*

And on the 21st day of February an order was entered upon the Journal of said Court in said cause, which said order is as follows, to wit:

MARÍA MARGARITA VOLCEY SOUFFRONT et al.
vs.
LA COMPAGNIE DES SUCRERIES DE P. R.

Order Allowing Writ of Error.

The plaintiffs by their attorney C. M. Boerman, Esq., having filed herein and presented to the Court their petition praying for the allowance of a writ of error and an assignment of error intended to be urged by them, praying that such other and further proceedings may be had as are proper in the premises.

On consideration thereof the Court does on this 21st day of February allow the writ of error, upon the plaintiff- giving bond according to law in the sum specified in an order of court made and entered under date of June 29th, 1907.

B. S. RODEY, *Judge.*

And on the same day and year last aforesaid a writ of error was issued out of the Clerk's office of said Court in said cause, which said writ of error is as follows, to wit:

Writ of Error.

In the District Court of the United States for Porto Rico.

MARIA MARGARITA VOLCEY SOUFFRONT, Widow of Fleu-
72 rian; María Elizabeth Odette Fleurian, and María Antoniette Ema Fleurian, Widow of Souffront,

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of América to the Honorable Bernard S. Rodey, Judge of the United States District Court for the District of Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between María Margarita Volcey Souffront, Widow of Fleurian; María Elizabeth Odette Fleurian and María Antoniette Ema Fleurian, Widow of Souffront, plaintiffs and La Compagnie des Sucreries de Porto Rico and Erneste Maurice, defendants a manifest error has happened to the great prejudice and damage of the said plaintiffs María Margarita Volcey Souffront, Widow of Fleurian; María Elizabeth Odette Fleurian and María Antoniette Ema Fleurian widow of Souffront, as is said and appears by the petition herein.

We, being willing that error, if any has been, should be duly corrected, and full and speedy justice done by the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within sixty days from the date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done

therein to correct that error, what of right and according to
73 the laws and customes of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 21st day of February in the year of our Lord one thousand nine hundred and eight.

JOHN L. GAY,
Clerk U. S. District Court of Porto Rico,
By A. AGUAYO,
Deputy Clerk.

Approved by

B. S. RODEY,
District Judge.

And the 25th day of March, 1908, the parties in said cause filed in the Clerk's office of said court a stipulation which is as follows, to wit:

Stipulation.

United States District Court for Porto Rico.

MARIA MARGARITA VOLCEY SUFFRONT, Widow of Fleurian; MARIA Elizabeth Odette Fleurian, and Maria Antoniette Ema Fleurian, Widow of Suffront,

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE.

It is hereby agreed by the parties plaintiffs in error and defendants in error that the time for docketing the record of the proceedings in the Supreme Court of the United States is hereby extended to thirty days after the return day of the writ, and that an order may be entered accordingly.

Dated the 24th day of March 1908 at San Juan, Porto Rico.

C. M. BOERMAN,
Attorney for Plaintiffs in Error.
HARTZELL & RODRIGUEZ SERRA,
Attorneys for Defendants in Error.

And on the same 25th day of March, 1908, an order was entered upon the record of said court in said cause, which said order is as follows, to wit:

United States District Court for Porto Rico.

MARIA MARGARITA VOLCEY SUFFRONT, Widow of Fleurian; MARIA Elizabeth Odette Fleurian, and Maria Antoniette Ema Fleurian, Widow of Suffront,

VS.

74 LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE.

Order.

Upon motion of Charles M. Boerman, attorney for the plaintiff herein and the attorney of the defendants consenting in writing thereto, it is ordered that the time of docketing and filing the transcript of the record of this case in the Supreme Court of the United States is and be enlarged and extended to thirty days after the return day of the writ of error heretofore granted by this court.

B. S. RODEY, *Judge.*

And on the 8th, day of April, 1908, came the parties by their respective attorneys and filed in the Clerk's office of said court a stipulation in said cause, which said stipulation is as follows, to wit:

Stipulation.

In the United States District Court for Porto Rico.

MARIA MARGARITA V. SUFFRONT DE FLEURIAN et al.

VS.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO et al.

It is hereby agreed between the attorney for the plaintiff in error and the attorneys of the defendants in error that the summons and order of publication with the returns of the service may be omitted from the transcript of record of the above entitled cause.

C. M. BOERMAN,
Attorney for Plaintiffs in Error.
HARTZELL & RODRIGUEZ SERRA,
Attorneys of Defendants in Error.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

In the District Court of the United States for Porto Rico.

I, John L. Gay, Clerk of the said Court do hereby certify that the foregoing is a true transcript of the record in the Case
75 of Maria Margarita Volcey Suffront de Fleurian et al. vs. La Compagnie des Sucreries de Porto Rico and Ernesto Maurice, not including the transcript of the writ of summons, order

of service by publication and the returns of the services thereof, omitted in this transcript as per stipulation of the parties in the case.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Ponce, P. R. this 8th day of April, 1908.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk U. S. District Court of Porto Rico.
By A. AGUAYO,
Deputy Clerk.

76 [Endorsed:] District Court of the United States for Porto Rico. #207. María Margarita Volcey Souffront, widow of Fleurian; María Elizabeth Odette Fleurian and María Antoniette Ema Fleurian, widow of Souffront, vs. La Compagnie des Sucreries de Porto Rico and Erneste Maurice. Transcript of Record.

77 In the District Court of the United States for Porto Rico.

MARIA MARGARITA VOLCEY SOUFFRONT, Widow of Fleurian; María Elizabeth Odette Fleurian, and María Antoniette Ema Fleurian, Widow of Souffront,

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO, AND ERNESTE MAURICE.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Bernard S. Rodey, Judge of the United States District Court for the District of Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Maria Margarita Volcey Souffront, widow of Fleurian; Maria Elizabeth Odette Fleurian and Maria Antoniette Ema Fleurian, widow of Souffront, plaintiffs and La Compagnie des Sucreries de Porto Rico and Erneste Maurice, defendants a manifest error has happened to the great prejudice and damage of the said plaintiffs Maria Margarita Volcey Souffront, widow of Fleurian; Maria Elizabeth Odette Fleurian and Maria Antoniette Ema Fleurian widow of Souffront, as is said and appears by the petition herein.

We, being willing that error, if any has been, should be duly corrected, and full and speedy justice done by the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within sixty days from the date hereof, in the said Supreme Court,

to be then and there held, that the record and proceedings
78 aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customes of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 21st day of February in the year of our Lord one thousand nine hundred and eight.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk U. S. District Court of Porto Rico.
By A. AGUAYO,
Deputy Clerk.

Approved by
B. S. RODEY,
District Judge.

79 [Endorsed:] No. 207 Ponce. María Margarita Volcey Souffront, et al. vs. Compagnie des Sucreries, et al. Writ of error. Filed Clerk's Office, United States Court. February 21, 1908. John L. Gay, Clerk of the Court. By A. M. Bacon, Deputy.

80 In the District Court of the United States for Porto Rico.

MARÍA MARGARITA VOLCEY SOUFFRONT, Widow of Fleurian; MARÍA Elizabeth Odette Fleurian and Maria Antoniette Ema Fleurian, Widow of Souffront,

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO, AND ERNESTE MAURICE.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to La Compagnie des Sucreries de Porto Rico, and Erneste Maurice, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, District of Columbia, United States of America, within sixty days from this date pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for Porto Rico wherein María Margarita Volcey Souffront, widow of Fleurian, Maria Elizabeth Odette Fleurian and Maria Antoniette Ema Fleurian, widow of Souffront are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 26th day of

February A. D. 1908, and of the Independence of the United States the one hundred and thirty-second.

B. S. RODEY,
Judge of the District Court of the United States for Porto Rico.

[Seal United States District Court for the District of Porto Rico.]

Attest:
JOHN L. GAY,
Clerk Dist. Court of the U. S. for Porto Rico.

81 Form No. 282.

Return on Service Writ.

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed citation on the therein-named Defendant La Compagnie des Sucreries de Porto Rico by handing to and leaving a true and correct copy thereof with Mr. Bret Chief Manager of the above company personally at the Playa Ponce in said District on the 5th day of March A. D. 1908.

H. S. HUBBARD,
U. S. Marshal.
GEO. TRAUTMAN,
Deputy.

82 Form No. 282.

Return on Service Writ.

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed writ on the therein-named La Compagnie des Sucreries de Porto Rico & Ernesto Maurice by handing to and leaving a true and correct copy thereof with Mr. Rodrigez Serra, member of the firm of Hartzell & Son, attorney for the Comp. des Sucr. de Porto Rico & Ernesto Maurice at San Juan in said District on the 9 day of March, A. D. 1908.

H. S. HUBBARD,
U. S. Marshal.
JOHN L. HERAS,
Deputy.

83 [Endorsed:] No. 207 Ponce. María Margarita Volcy Souffront, et al., vs. La Compagnie des Sucreries de P. R. et al. Citation.

Endorsed on cover: File No. 21,161. Porto Rico D. C. U. S. Term No. 155. Maria Margarita Volcey Souffront, widow of Fleurian, Maria Elizabeth Odette Fleurian and Maria Antoinette, Ema Fleurian, widow of Souffront, plaintiffs in error, vs. La Compagnie des Sucreries de Porto Rico and Erneste Maurice. Filed May 5th, 1908. File No. 21,161.

[illegible]

Supreme Court of the United States

OCTOBER TERM [illegible]

No. [illegible]

MARIA MARGARITA VOLCOSY SOUFFRONT, [illegible] FLEURIAN, MARIA ELIZABETH ODETTE FLEURIAN and MARIA ANTOINETTE EMA FLEURIAN, [illegible] SOUFFRONT,

[illegible]

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE

BRIEF FOR PLAINTIFFS IN ERROR

CHARLES M. BOERMAN,

Of Counsel for Plaintiffs in Error.

Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 155.

MARIA MARGARITA VOLCEY SOUFFRONT, WIDOW OF FLEURIAN; MARIA ELIZABETH ODETTE FLEURIAN, AND MARIA ANTOINETTE EMA FLEURIAN, WIDOW OF SOUFFRONT,

Plaintiffs in Error,

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO AND ERNESTE MAURICE.

In Error to the District Court of the United States for Porto Rico.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

Statement.

This case is brought up to this Court by a writ of error from a final judgment of the United States District Court for the District of Porto Rico.

On July the 2nd, 1906, the plaintiff's filed their

complaint in the said United States District Court for Porto Rico against the said defendants, alleging therein: that these plaintiffs were the heirs of Clemente Fleurian, deceased, who at and before his death was seized in fee and entitled to the possession of a certain peace of land, known by the name of Hacienda Serrano, of five hundred acres more or less; that the defendants entered and possessed themselves of the said Hacienda Serrano and still possess and unlawfully withhold the possession of the same, from the plaintiffs, to their damage of One Hundred and Fifty Thousand Dollars; that the value of the rents and profits of the said premises since and beginning from the 12th of April, 1904, the date at which the defendants unlawfully possessed themselves of the said premises, amounts to Fifteen Thousand Dollars; asking judgment for the said amounts and their costs. (Record folio 2.)

The defendants then filed their demurrer to the complaint, alleging as grounds for said demurrer: that the complaint does not state facts sufficient to constitute a cause of action, because of want of allegation of possession in the plaintiffs at any time; because also that it was not alleged that at the time of the commencement of the action the plaintiffs were entitled to possession; because there is no allegation that the plaintiffs were ever ejected from or dispossessed of said premises by the defendants, and finally because there is no denial in the complaint of the title of the defendants to the premises. (Record folio 4 and 5.)

The demurrer to the complaint having been considered by the Court, the plaintiffs were ordered to amend the complaint by interlineation as to damages claimed and to file a bill of particulars as to rents and profits, all of which was forthwith done by the plaintiffs; the demurrer was overruled by

the Court and the defendants were ordered to file an answer to the complaint. (Record folio 6.)

The answer of the defendants to the complaint alleges: as a first defence, a general denial of the complaint; as a second defence, the answer alleges: that the defendants have acquired the premises in issue from certain persons, Juan Forgas, and Jose Gallart, who, it is alleged in the answer, acquired the same from other persons: David Laporte, Dona Emilia and Dona Agata Laporte and Don Jose Simon Adrian Armando Lombart by name, who recorded title of the said property in 1881 by institution of so called "possessory proceedings"; and that the defendants and their predecessors in title have possessed in good faith and with a proper title the said premises for a length of time which is sufficient to bar the action of the plaintiffs by prescription, according to Section 1858 of the Civil Code of Porto Rico. (Record folio 8.)

As a third defence, the answer alleges, that: the said Clemente de Fleurian, being the person named in the plaintiff's complaint herein, and through whom, as the heirs and successors thereof, the plaintiff's herein claim the title to the premises described in the complaint, had obtained fraudulently, on the 9th day of October, 1879, a deed from the owners' thereof and that he thereupon executed a mortgage thereon to one Fernando Labastide. That thereupon David Laporte, Dona Emilia and Dona Agata Laporte and Jose Simon Adrian Armando Lombart brought proceedings in the Court of the First Instance of the City of Ponce, Porto Rico, in the District where the land is situated, against the said Clemente de Fleurian and Fernando Labastide with the object of annulling and rescinding the said deed obtained by Fleurian of the Hacienda Serrano and also annulling the mortgage thereon executed by him in favor of Fernando Labastide. That the said

Ponce Court rendered judgment in favor of those plaintiffs and against Fleurian and Labastide, annulling said deed and mortgage. That the said judgment of the Ponce Court was on appeal confirmed by the Supreme Court of Porto Rico and also by the Supreme Court of Spain, in which Court the appeal was dismissed for failure of prosecution. That the said decision or judgment is a bar to this action. It is also alleged in the same defence that proceedings to annul the deed were brought in French Courts and that during and pending the determination of the said proceedings the owners sold the Hecienda Serrano to Juan Forgas and Jose Gallart and that in the deed of sale and conveyance of the said premises to Forgas and Gallart it was expressly agreed that the owners or vendors should conduct the litigation necessary to free the title of the said premises from any lien, cloud or incumbrance whatsoever and that they, the vendors, in accordance with said agreement instituted thereafter the proceedings above described in the Court of First Instance of the City of Ponce, Porto Rico, to annul the deed and mortgage. (Record folio 10 and following.)

The fourth defence in the answer of the defendants alleges: that on the 9th day of October, 1879, David Laporte and the other owners of the Hacienda Serrano have executed a contract of sale of the same to Clemente de Fleurian, but that he fraudulently procured and obtained it and never complied with its terms and conditions, and that the said Laporte and the other owners of the said premises instituted an action in the Civil Tribunal of Nimes in the Republic of France for the purpose of declaring the said contract of sale null and void, and that a final judgment was rendered by the said Tribunal on the 10th day of May, 1880, declaring said instrument null and of no effect. That the

said judgment having been appealed from to the Court of Appeals of Nimes was confirmed, and that an appeal to the Court of Cassassion of Paris, on May the 17th, 1886, was dismissed and the judgment confirmed. That therefore said judgment should prevent the plaintiffs from presecuting their action. (Record folio 53 and following.)

The fifth defence put up in the answer of the defendants alleges, that on the first day of February, 1904, these same plaintiffs in the present action filed a complaint in Equity directed against the "Sucesion of Jose Gallart," through whom defendants claim title. That in the said suit the complaintants claimed the ownership of the Hacienda Serrano as the heirs of Clemente de Fleurian, and prayed to declare null and void a deed of the said premises from Laporte to Jose Gallart and Juan Forgas, and also to recover from the said "Sucesion of Gallart" all of the proceeds and profits received from the said premises during the occupancy thereof by the said Gallart and his succession, up to the time of the bringing of said action. That the Court rendered the following decree, to wit: On consideration of the demurrer to the bill of complaint herein, the same is sustained and this case is dismissed at the complainant's costs. That said decree is a matter of res adjudicata, and that therefore this action should be dismissed. (Record folio 56 and following.)

The plaintiffs in this case then filed a demurrer to the third, fourth and fifth defences set out in the answer of the defendants, on the ground that the facts stated therein do not constitute a defence to the complaint. (Record folio 58.)

The plaintiffs also moved to strike out those parts of the answer which set out fully all the formal judgments in the case on the ground that they encumbered the record, and being matters of proof

which need not be set out fully in the pleadings. (Record folio 58.)

The Court then subsequently overruled the demurrer to the answer and the motion to strike and called upon the plaintiffs to file a replication. (Record folio 63.)

The plaintiffs then filed their replication, in which they allege:

1st. Want of just title and good faith in the defendants.

2nd. Impugnation of the alleged prescription.

3rd. Plaintiffs deny the alleged fraud, and allege: good faith, valuable consideration and delivery of the deed, by the vendors and their agents.

4th. Admitting the rendering of the judgment in the Ponce Court of First Instance, mentioned in the third defence of the answer, the plaintiffs allege that said judgment was rendered against Clemente de Fleurian while he was insane and without a guardian or committee of his person being named by the Court; and that the defendants herein were neither parties nor privies to said judgment and suits and appeals.

5th. Admitting the judgment rendered by the French Court mentioned in the fourth defence of the answer, the plaintiffs allege, that said Court had no jurisdiction in the subject matter, and further that the defendants herein were neither parties nor privies to the said judgment and suit.

6th. Admitting the rendition of the decree mentioned in the fifth defence of the answer, the plaintiffs allege that said decree was not rendered on the merits of the case, and without any proof being taken, but only upon a demurrer to the complaint on the purely equitable defences of laches and want of Equity, and that therefore the decree is not a bar to this action. (Record folio 56.)

The Court then rendered judgment on the plead-

ings in favor of the defendants, dismissing the complaint at the cost of the plaintiffs. (Record folio 57.)

The plaintiffs then petitioned for a writ of error to this Court, which was granted.

Assignment of Errors Relied Upon.

First. The United States District Court for Porto Rico, erred in overruling the demurrer of the plaintiff's to the third defence set up in the answer.

Second. The said Court erred in overruling the demurrer of the plaintiff's to the fourth defence set up in the answer.

Third. The said Court erred in overruling the demurrer of the plaintiff's to the fifth defence set up in the answer.

Fourth. The said Court erred in rendering judgment against the plaintiffs upon the pleadings, and that said judgment is contrary to the law and facts as stated in the pleadings.

POINTS.

First. This Court has jurisdiction on appeal or writ of error.

Second. The Court below had jurisdiction in the case.

Third. That those who acquired a title before any suit brought by the former owners are not privies, and that only those who acquired subsequently to the judgment rendered are bound, precluded or benefited by such judgment.

Fourth. That the judgment of a foreign court and especially a French Court does not have the effect of res judicata, upon lands or real estate situated in this country.

Fifth. That a judgment or decree in Equity rendered upon a demurrer to the bill without consider-

ation of the merits of the case has not the effect of res judicata.

Sixth. That a United States Court in an action at law cannot render judgment upon the pleadings where the facts alleged by one party are denied by the other party and without the intervention of a jury.

POINT 1.

This Court Has Jurisdiction on Appeal.

In Royal Insurance Company vs. Martin, 192 U. S., 149, 161, it was held that this Court has jurisdiction in appeals and writs of error coming from Porto Rico "in every case" without regard to the sum or value in dispute, where the Constitution of the United States or a treaty thereof or an act of Congress is brought in question and the right claimed thereunder is denied, and in every other case where the sum or value in dispute exceeds $5,000, exclusive of costs."

As the amount involved in this case is over One Hundred and Fifty Thousand Dollars (Record folio 3), the jurisdiction of this Court is clear.

POINT 2.

The Court Below Had Jurisdiction of the Case.

Section 3, of the Act to amend an Act entitled: etc. (So-called Foraker Act). Approved March the 2nd, 1901, says:

"That the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall in addition to that conferred by the Act of April the

12th, 1900, extend to and embrace controversies where the parties, or either of them are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interests or costs, the sum or value of One Thousand Dollars."

As in this case all the defendants are foreigners and the value is of more than One Thousand Dollars, the Court below had jurisdiction of the case.

POINT 3.

Those who acquire a title before any suit brought by the vendors or former owners are not to be considered as privies to such suit or a judgment thereon.

This is a very elementary principle of law, as old as the law itself. Freeman on Judgments, First Edition, Section 162, says, as follows: "It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment, whose succession to the rights of property thereby affected, occurred previously to the institution of the suit. A tenant in possession prior to the commencement of an action of ejectment cannot therefore be lawfully dispossessed by the judgment unless made a party to the suit. . . . No grantee can be bound by any judgment in an action commenced against his grantors subsequent to the grant, otherwise a man having no interest in property could defeat the estate of the true owner. The foreclosure of a mortgage, of or any other lien, is wholly inoperative upon the rights of any person not a party to the suit, whether such person is a grantee, judgment creditor, attachment creditor, or other lien holder."

We quote the language of Mr. Justice Brewer in the case of Dull vs. Blackman, 169 U. S., page 248, where after quoting the said citation from Freeman he says: "We remark again that while a judgment or decree binds not merely the party or parties subject to the jurisdiction of the Court but also those in privity with them, yet that rule does not avail the plaintiffs in error, for Phelon acquired his rights prior to the institution of the suit in New York, and was therefore not privy to that judgment."

In the case of Kerr vs. Watts, 6 Wheaton, page 560, this Court has said: "It is further contended, that the defendants are not bound by the decree in the case of Watts vs. Massy, because neither parties nor privies nor pendente lite purchasers. That those who come not into this Court, in any one of those characters, are not subject to the direct and binding efficacy of an adjudication, is unquestionable."

See further:

Cannon River Manufacturing Association vs. Rogers, (Minn.), 43 N. W. R., 792.
7 L. R. A., 579 Note and 582.
Sessions vs. Johnson, 95 U. S., 347.

It was held by this Court, that a decree declaring null and void an agreement between parties is binding only on such parties and does not void it as to other persons.

Graham vs. La Crosse M. R. Company, 70 U. S. (3 Wal.), 704.

It was also held by this Court that a party not concluded or bound by a judgment cannot invoke such judgment as estoppel against others.

Says Mr. Justice Brown in the case of Keokuk Railroad vs. Scotland County, 152, U. S., page 326: "We hold that it would not have been estopped by

that decree, if such decree had been adverse to Secor in that suit, and hence, as estoppels must be mutual, it cannot claim the benefit of an estoppel in this case."

See also Bedon vs. Devie, 144 U. S., 143.

"The operation of an estoppel must be mutual," says Justice Brewer in Keokuk N. W. R. vs. Missouri, 152 U. S., 317.

POINT 4.

The judgment of a foreign Court, and especially a French Court, upon the rights or title to real estate, situated in this country, has not the effect of res judicata.

We cite again from the opinion of Mr. Justice Brewer in the case of Dull vs. Blackman, 169 U. S., 246:"

"Upon these facts we remark that as the land, the subject matter of this controversy, was situated in Iowa, litigation in respect to its title belonged properly to the courts within that State, Ellenwood vs. Marietta Chair Company, 158 U. S., 105, 107, although if all the parties interested in the land were brought personally before a court of another State, its decree would be conclusive upon them and thus in effect determining the title. The suit in New York was one purely in personam. Any decree therein bound simply the parties before the Court and their privies, and did not operate directly upon the lands. As said by this Court in Carpenter vs. Strange, 141 U. S., 87, 105: "The real estate was situated in Tennessee and governed by the law of its situs, and while by means of its power over the person of a party a

Court of Equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property nor effects the title, but is made effectual through the coercion of the defendants, as, for instance, by directing a deed to be executed or cancelled by or on behalf of the party. The Court has no inherent power, by the mere force of its decree, to annul a deed or to establish a title." In the case of Hilton vs. Guyot, 159 U. S., 113, this Court, after having reviewed almost all the jurisprudence bearing upon this question, has concluded on page 227 as follows: "The reasonable, if not the necessary, conclusion appear to us to be that judgments rendered in France, or in any other foreign country by the laws of which own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiff's claim.

"In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of International law, recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive."

"By our law at the time of the adoption of the Constitution a foreign judgment was considered as prima facie evidence, and not conclusive. There is no Statute of the United States, and no Treaty of the United States with France, or with any other nation, which has changed that law, or has made

any provision upon the subject. It is not to be supposed that, if any Statute or treaty had been or should be made, it would recognize as conclusive the judgments of any country, which did not give like effect to our judgments. In the absence of Statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires any thing more.

"If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants' offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. If the judgment had been rendered in this country or in any other, outside of the jurisdiction of France, the French Court would not have executed or enforced it, except after examining into its merits. The very judgment now sued on would be held inconclusive in almost any other country than France. In England, and in the Colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation, it would be subject to re-examination, either merely because it was a foreign judgment, or because judgments of the nation would be re-examinable in the courts of France."

We now quote from the opinion of Mr. Chief Justice Fuller, in the case of Carpenter against Strange, 141 U. S., page 105: "The real estate was situated in Tennessee and governed by the law of its situs, and while by means of its power over the person of a party a Court of Equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of

the defendant, as for instance, by directing a deed to be executed or cancelled by or on behalf of the party. The Court 'has no inherent power,' by the mere force of its decree, to annul a deed, or to establish a title.'

Hart v. Sansom, 110 U. S., 151, 155.

Hence although in cases of trust, of contract and of fraud, the jurisdiction of a Court of Chancery may be sustained over the person notwithstanding lands not within the jurisdiction may be affected by the decree, (Massie v. Watts, 6, Cranch 148), yet it does not follow that such a decree is in itself necessarily binding upon the courts of the State where the land is situated. To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment in rem by a court having no jurisdiction over the res.

"By its terms no provision whatever was made for its enforcement as against Mrs. Strange in respect of a real estate. No conveyance was directed, nor was there any attempt in any way to exert control over her in view of the conclusion that the Court announced. Direct action upon the real estate was certainly not within the power of the Court, and as it did not order Mrs. Strange to take any action with reference to it, and she took none, the Courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee exclusively subject to its laws and the jurisdiction of its courts. Story Confl. Laws, § 543; Whart. Confl. Laws, §§ 228, 289; Watkins v. Holman, 16 Pet. 25; Northern Indian Railroad v. Mich. Cent. Railroad, 15 How. 233; Davis v. Headly, 22 N. J. Eq. (7 C. E. Green) 115; Miller v. Birdsong, 7 Baxter, 531; Cooley v. Scarlett, 38 Illinois, 316; Gardner v. Ogden, 22 N. Y., 327."

We believe it is clear from the citations quoted that the decree of a French Court cannot affect real estate situated in this country, and therefore such a decree cannot be considered as res judicata in bar of an action to recover the lands.

POINT 5.

A decree in equity rendered upon a demurrer to the bill without considering the merits of the case has not the effect of res judicata.

We quote from the opinion of Mr. Justice Field in the case of Hughes v. United States, 4 Wall., 237: "In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." (Walden v. Bodley, 14 Peters, 156; I. Greenleaf's Ev., §§ 529 and 530, and authorities there cited.)

Says Mr. Justice McKinley in the case of Hickey et al v. Stewart et al, 3 How. 758: "The Court by its decree established the right of the complainants to the land in controversy and ordered Mather's heirs, who were all non-residents of the State of Mississippi to convey the land to the complainants and to deliver to them the possession, and awarded the writ of habere facias; which writ the Court of Chancery is authorized to order by a Statute of the State, without the aid of this writ,

the Court could not have put the complainants into possession, the defendants being out of their jurisdiction; nor could they for the same reason compel a conveyance of the title to the land. The decree is therefore, if otherwise valid, nothing more than an equitable right, ascertained by the judgment and decree of a Court of Chancery; and until executed by a conveyance of the legal title, according to the decree, Starke's heirs and those claiming under them, have nothing but an equitable title to the land in controversy.

"To teach the defendants in this case to defend their possession successfully, upon their own title, that title must be shown to be a good and subsisting legal title, and superior in law to that set up by the plaintiffs; otherwise it opposes no legal bar to the recovery in the action of ejectment. And conceding what was contended for in argument, that the decree and possession under it, by the writ of habere facias, is equivalent to a judgment in ejectment, followed by like possession, it would avail the defendants nothing in this case; because such a judgment and possession are no bar to another action of ejectment for the same premises." In the note to this opinion among other things is said: "A judgment is never admissible in evidence between the same parties unless the precise point which is in issue was put in issue and appears from the record to have been decided. In the second suit in ejectment, this is impossible, for the same point is not put in issue—a point in difference of time. Smith v. Sherwood, 4 Conn., 276; Stevens v. Hughes, 31 Pen. St., 381."

See Freeman on Judgments, Sec. 270.

Besides as the action in the case at bar is in the nature of the trial of the title it is not barred even by a former judgment in ejectment. See Mallet v. Foxcroft, 1 Story, 477.

Foxcroft v. Mallet, 4 How., 378.
Sthroter v. Lucas, 12 Pet., 434.
Merryman v. Bourne, 9 Wall., 599.

POINT 6.

A United States Court in an action at law cannot render judgment without a jury upon the pleadings, where the facts alleged by one party are controverted by the other party.

Seventh amendment to the Constitution of the United States.

United States v. La Vengeance, 3 Dall., 297.
Bank of Columbia v. Oakly, 4 Wheaton, 235.
Edwards v. Elliot et al, 21 Wall., 532.

This Article of the Constitution is in force in all the organized Territories of the United States.

Cannon v. Gilmer, 131 U. S., 28.
Tompson v. Utah, 170 U. S., 346.

Section 34 of the Act temporarily to provide Revenues and a Civil Government for Porto Rico, of April 12th, 1900, provides, that the United States District Court for Porto Rico shall proceed in the same manner as a Circuit Court.

Conclusions.

We have tried to demonstrate and believe to have shown: First, that the judgment of the French Courts put up as a bar to the action in this case has no such effect; Second, that the defendants in the case at bar cannot be considered as privies, be-

cause they have acquired, if any, a pretended title before the proceedings have been established and judgments thereon rendered, except in the equity case pleaded as above; Third, that the decree in this equity case has not been rendered upon the merits of the case or after a hearing, but upon a demurrer to the complaint and that such a decree is not res judicata in any case, and specially to prevent the trial of a title to land, which is the subject matter of the case at bar.

Now as it is clear from the Records in this case that all the allegations in the answer of fraud, non-delivery of the deed, and non-compliance with the provisions of the deed, have been denied specially in the Replication by the plaintiffs (although the plaintiffs did not need to reply, but did so under special order of the Court in the decision upon the demurrer, because under the Code of Civil Procedure of Porto Rico, Section 132, the statement of any new matter in the answer must be deemed controverted by the opposite party), it is evident that the Court below erred in giving judgment upon the pleadings, that is to say: assuming that the allegations of the answer are true, which the Court had no right to assume, they being controverted; and that the Court had no power to try the issues of fact in the case or to decide upon them without the intervention of a jury.

We therefore respectfully submit to this Court that the judgment in this case be reversed, and the case remanded for a trial by a jury of the issues involved.

CHARLES M. BOERMAN,
Of Counsel.

No. 155.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

MARIA MARGARITA VOLCEY SOUFFRONT, WIDOW OF FLEURIAN; MARIA ELIZABETH ODETTE FLEURIAN, and MARIA ANTOINETTE EMA FLEURIAN, WIDOW OF SOUFFRONT,

Plaintiffs in Error,

v.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

Brief for Plaintiffs in Error.

HANNIS TAYLOR,
Of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1909.

MARIA MARGARITA VOLCEY SOUFFRONT, WIDOW OF FLEURIAN; MARIA ELIZABETH ODETTE FLEURIAN, AND MARIA ANTOINETTE EMA FLEURIAN, WIDOW OF SOUFFRONT,
Plaintiffs in Error

v.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO AND ERNESTE MAURICE.

No. 155.

In Error to the District Court of the United States for Porto Rico.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This writ of error brings to this Court the record in an ordinary action of ejectment in which the Court below, *after the issues of fact had been made up for trial by jury*, unlawfully undertook to substitute itself for the jury, to find the facts

involved in the contested issues, and to render judgment thereon, without any pretense of a waiver of the right of trial by jury by consent of parties. Counsel for defendants in error frankly admit in their brief filed here (p. 3) that

> "The case herein presented is an isuue, raised by a complaint in an ordinary action for ejectment and to which had been presented, by way of answer, five separate defenses: first, a general denial; second, prescription; and third, fourth and fifth, various legal proceedings affecting, as defendants in error *contend*, the same parties and the same controversy, and which are pleaded by way of *res adjudicata* to plaintiffs' action. *To these defenses the replication of plaintiffs in error is filed*," etc.

The pleadings never advanced beyond that point, because the Court then took charge of the case and usurped the province of the jury to pass upon the contested issues of fact which the replication very sharply presented for trial by jury.

The facts involved, so far as this Court is required to consider them on this record, are briefly these: Clemente de Fleurian, a citizen of France, died in Porto Rico on or about February 24, 1892, intestate, leaving as his legal succession, his widow, Maria M. V. Souffront, and his two children, Maria E. O. Fleurian and Maria A. E. Fleurian. On July 2, 1906, these three brought this action of ejectment to recover the lands in question then in possession of these defendants in error, who claim to have purchased the same in April, 1904. In their complaint thus filed the heirs of Fleurian allege that the value of the corpus of the property is $150,000, and that the rents, issues and profits due them amount to $15,000. They also allege that Clemente Fleurian, from whom they derive title, "was at and before his death seized in fee and entitled to the

following premises, to wit," etc. To that complaint these defendants interposed in an answer the five defenses, above described, each one of which involved an issue of contested facts. To those five defenses these plaintiffs in error filed, by special leave of the Court (Record, p. 41), a replication in the following form (Rec., pp. 41–42).

"In the District Court of the United States for Porto Rico.

MARIA MARGARITA VOLCY SOUFFRONT, Widow of Fleurian; Maria Elizabeth Odette Fleurian, and Maria Antoniette Ema Fleurian, Widow of Souffront, Plaintiffs,

v.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and ERNESTE MAURICE, Defendants.

Replication.

"Now come the plaintiffs herein, in conformity with the order of the Court entered herein and make reply to the answer of the defendants as follows:

"First. They deny that the defendants have ever had any just title to the premises or that those from whom they derived title have possessed the premises in good faith or with just title.

"Second. The plaintiffs impugn the alleged prescription either of ten years or of twenty years.

"Third. The plaintiffs deny the allegations in the answer that the ancestor Clemente de Fleurian has obtained the deed to the properties described in the complaint through fraud and they allege that he purchased the said properties in good faith and for valuable consideration and always was ready and the plaintiffs are ready to comply with all the conditions of the said deed of sale and that said deed was delivered to him by the vendors and their agents.

"Fourth. The plaintiffs admit that the judgment mentioned in the answer as a third defense to the complaint have been rendered but the suits in which said judgments were rendered have been instituted against Clemente de Fleurian while he was insane and out of his mind and without any curator or guardian or committee of his person being named by the Court; and that the defendants herein were neither parties nor privies to the said judgments and suits and appeals and therefore said judgments cannot bar this action.

"Fifth. The plaintiffs admit that the judgment mentioned in the answer as a fourth defense to the complaint has been rendered, but the plaintiffs state that the Court which rendered said judgment had no jurisdiction in the subject matter and said judgment being of a foreign court without jurisdiction is not binding, and the plaintiffs further allege that the defendants herein were neither parties nor privies to the said judgment and suit, and therefore said judgment is not a bar to this action.

"Sixth. The plaintiffs further replying say that the judgment or decree mentioned in the answer as a fifth defense to the complaint was rendered not upon the merits of the case and without any proof being taken, but only upon a demurrer to the complaint for want of equity and for laches, both purely equitable defenses available only in suits in equity, and the plaintiffs state that this decree is not a bar to this action.

"Wherefore the plaintiffs pray judgment thereon.

BOERMAN AND LLORENS,
Attorneys for Plaintiffs."

By that formal replication, filed as such, plaintiffs in error put in issue every material fact upon which the several defenses set up by the defendants depended. Instead of submitting such issues to a jury, alone capable of trying them, the Court unlawfully substituted itself for the jury and attempted to decide such issues and dis-

missed the case, without any pretense that any consent that the Court should so act had ever been entered into. The record (p. 42) recites:

> "Now, upon application by Hartzell and Rodriguez the attorneys of said defendants, the cause is dismissed at the cost of the plaintiffs to be taxed by the clerk, for which execution may issue. Plaintiffs except to the dismissal hereof. And on June 29, 1907, an entry was made upon the Journal of said Court in said cause, which said entry is as follows, to wit:
>
> MARIA M. VOLCEY SOUFFRONT
>
> *v.*
>
> COMPAGNIE DES SUCRERIES DE PORTO RICO.
>
> "Upon application of C. M. Boerman, attorney for the plaintiff herein, the bond for cost on appeal is fixed at the sum of two hundred and fifty dollars. And on February 17, 1908, came the plaintiffs by their attorneys and filed in the Clerk's office of said Court a petition for a writ of error, and assignment of errors and a bond for a writ of error, which said petition, assignment and bond are as follows, to wit."

In the assignment of errors so filed the action of the District Court of Porto Rico in usurping the functions of the jury by "rendering judgment against the plaintiffs in said cause upon the pleadings in said cause" is specifically assigned as error here.

A SINGLE QUESTION OF LAW INVOLVED.

As pointed out in the brief of Mr. Boerman (pp. 8 and 9) there is no question either as to the jurisdiction of the Court below or as to the jurisdiction of this Court to review its action on this writ of error. This Court need consider only a single question which is this: Did the

District Court err in substituting itself for the jury, and in passing upon the contested issues of fact presented by the replication, without a waiver of the right of trial by jury by consent of parties. In Baylis *v.* Travelers' Ins. Co., 113 U. S. 316, this Court held that the trial of issues of fact in civil cases by the courts of the United States without the intervention of a jury, can be had only when the parties waive their right to a jury by a stipulation in writing. In that case this Court said:

> "But without a waiver of the right of trial by jury by consent of parties, the Court errs if it substitutes itself for the jury and, passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon. This was what was done in the present case. It may be that the conclusions of fact reached and stated by the Court are correct and, when properly ascertained, that they require such a judgment as was rendered. *That is a question not before us.* The plaintiff in error complains that he was entitled to have the evidence submitted to the jury and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the Court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury. In this particular, we think error has been well assigned. The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases by the Court without the intervention of a jury only when the parties waive their right to a jury by a stipulation in writing. R. S. 648, 649. This constitutional right this Court has always guarded with jealously. Elmore v. Grymes, 1 Pet. 469; D'Wolf *v.* Rabaud, 1 Pet. 476; Castle *v.* Ballard, 23 How. 172; Hodges *v.* Easton, 106 U. S. 408."

That case was approved in Idaho, etc. Land Co. *v.* Bradbury, 132 U. S. 515. In Morgan *v.* Gay, 19 Wall. 81, this Court said:

> "We may notice another error which will, doubtless, be avoided should there be a second trial. *Issues of fact appear to have been made up which were determined by the Court in the absence of defendant's counsel, and without any written agreement to waive a jury trial.* This was irregular. In the absence of such an agreement, and of the defendants' counsel, it was not competent for the Court to try the issue without the intervention of a jury. Kearney *v.* Case, 12 Wall. 275."

In that case this Court, speaking through Mr. Justice Miller said:

> "If the state of the pleadings presents issues of fact to be tried, and there is nothing to show that the party complaining of the error was present by himself or counsel at the trial, and no jury was called, we think it is error for the Court to try those issues without a jury, because there can be no presumption that the party has waived his legal and constitutional right to have a jury."

In this case, after the pleadings had been made up presenting issues of fact to be tried by jury, the Court, without calling a jury, proceed to try such contested issues of fact and to render judgment upon them, without any pretense that trial by jury had been waived. As this Court said in Baylis *v.* Travelers' Ins. Co.:

> "It may be that the conclusions of fact reached and stated by the Court are correct and, when properly ascertained, that they require such a judgment as was rendered. *That is a question not before us.*"

So in this case this Court cannot inquire whether or no the conclusions of law of the judge of the District Court of Porto Rico, upon his assumptions as to the contested facts, were sound or unsound. Suffice it to say that the attempt of that judge to substitute himself, without the consent of the parties, for a jury was a usurpation of judicial power long ago denounced by the decisions of this Court. It is as unnecessary as it would be improper to burden this Court with any discussion as to the soundness or unsoundness of the conclusions as to fact or law embodied in the so-called opinion filed by the District Judge. This Court is only called upon by this record to reverse the judgment of dismissal and to remand the cause with a direction that the issues of contested facts as presented by the pleadings be tried by jury according to law.

The Act of April 12, 1900 (31 Stat. at L. 77, Chap. 191) provides (Sec. 34) that the District Court of Porto Rico shall have—

> "in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, *and shall proceed therein in the same manner as a Circuit Court.*"

And this Court knows from its judgment in Royal Ins. Co. *v.* Martin, 192 U. S. 149, that trial by jury is a part of the machinery of that Court.

Counsel for defendants in error frankly admit that if the pleadings as made up present issues of contested fact, that a trial of such issues by jury was the right of plaintiffs in error. On page 10 of their brief that admission is made in this form:

> "It would, of course, be true if there were not the admissions thus contained in the said replication,

that a trial of the issues would have been necessary with the intervention of a jury."

The hopeless effort is then made to demonstrate that no contested issues of fact were presented by the pleadings after the filing of the replication which sharply traversed every material allegation set up in the five defenses embodied in the answer. A mere reading of the replication annihilates that contention. It is really too plain for argument that the case must be reversed in order that the contested issues of fact in this action of ejectment may be tried by jury.

Respectfully submitted.

HANNIS TAYLOR,
Of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

October Term, 1909.

FLEURIAN, ET ALS.

v.

LA COMPAGNIE DES SUCRERIES, ET AL.

No. 155.

ADDITIONAL BRIEF FOR PLAINTIFFS IN ERROR.

During the argument in No. 154 Mr. Justice White admonished counsel, with great emphasis, that after principles have been firmly and repeatedly settled here it is improper for counsel to make reârguments which ignore such settlements. Guided by that wise and necessary rule my original argument accepted as final, the oft-repeated judgments of this Court to the effect that the trial of issues of fact in civil cases by the courts of the United States, without the intervention of a jury, can be had only when the parties waive their right to a jury by stipulation in writing. Baylis *v.* Travelers' Ins. Co., 113 U. S. 316; Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 515; Morgan *v.* Gay, 19 Wall. 81; Kearney *v.* Case, 12 Wall. 275.

The record shows that the contested issues of fact were

deliberately made up in this case, *with great formality*, under the direction of the Court below. A formal replication was filed by leave of the Court on June 22, 1907. *Defendants, by their failure or refusal to demur to that replication, admitted its sufficiency in law as a complete answer to all of their pleas.* There is no exception to the rule that such is the legal effect of a failure to demur, when the Court has jurisdiction over a real cause of action. Such has always been the rule as recognized by this Court. See Enc. Pl. and Pr., vol. 6, pp. 372, 379; Rhode Island *v.* Mass., 12 Pet. 657; Evans *v.* Gee, 11 Pet. 85; Bell *v.* Mobile, R. Co., 4 Wall. 598; Statton *v.* Embry, 93 U. S. 553.

Unless this Court destroys that rule, as old as common law pleading, it cannot permit these defendants to file here a demurrer to the replication. Without such a demurrer in the record this Court has no jurisdiction to inquire whether or no the matters pleaded in the replication are sufficent answers in law to the pleas.

In Baylis *v.* Travelers' Ins. Co. this Court said:

"It may be that the conclusions of fact reached and stated by the Court are correct and, when properly ascertained, that they require such a judgment as was rendered. *That is a question not before us.*"

So in this case the facts set up in the pleas and traversed, *or destroyed by the matter set up in avoidance*, are not before this Court in any possible form. Unless this Court can substitute itself for a jury and determine, *in the absence of all evidence*, that the contested facts put in issue by the pleadings are in favor of defendants, then no inquiry can be made into the legal sufficiency of the defenses set up by the pleas.

When the Court inspects the replication it will find

(1) that it directly traverses the facts set up in the first and second pleas; (2) that in reply to the judgments set up as *res judicata* in the third and fourth pleas it says that when the first was rendered Fleurian "*was insane and out of his mind and without any curator or guardian or committee of his person being named in court;*" (3) that the Court which rendered the second "had no jurisdiction of the subject matter, and said judgment being of a foreign court without jurisdiction is not binding;" (4) "that the defendants herein were neither parties nor privies to the said judgments and suits and appeals and therefore said judgments cannot bar this action." By failing to demur to the replication, defendants have admitted that these facts are a complete defense in law to each and every plea filed; by failing to traverse the matter set up in avoidance in the replication defendants have admitted the truth of every fact so pleaded. By what process can this Court upon this record, thus made up, wipe out such admissions made by the defendants in the Court below, and substitute a contrary state of facts here?

But suppose this Court shall conclude to inquire whether or no the certain judgment set up as *res judicata* in the third defense or plea (Record, pp. 7–33) is really such. Upon its face, at the very outset of it (Record, p. 9), the fact is recited that "Clemente de Fleurian and Don Fernando Labastide, domiciled respectively on Torres Street and Plaza Principal of the city, *the first named party being without representation as he failed to appear, and the case was prosecuted by default*, etc." In juxtaposition with that admission that Fleurian was not represented and did not appear in court, and that "the case was prosecuted by default," stands this allegation in the replication:

"The plaintiffs admit that the judgment mentioned in the answer as a third defense to the complaint has been rendered, but the suits in which said judgments were rendered have been instituted against Clemente de Fleurian while he was insane and out of his mind and without any curator or guardian or committee of his person being named by the Court."

As those facts stand admitted by defendants in error, is it possible for this Court to hold that an insane person, who did not appear and who was unrepresented by curator or guardian, could be bound by a judgment rendered by default under such circumstances?

Apart from that defendants in error admit that part of the replication which avers "that the defendants herein were neither parties nor privies to the said judgments and suits and appeals and therefore said judgments cannot bar this action." Then again, suppose this Court shall conclude to make a like inquiry as to the judgment set up as a fourth defense (Record, pp. 33–35), such judgment purporting to have been rendered "in the civil tribunal of Nimes in the Republic of France," in such a form as to affect the title of a sugar plantation in Porto Rico. While the replication admits that the judgment referred to was rendered in France, it avers:

"that the Court which rendered said judgment had no jurisdiction of the subject-matter and said judgment being of a foreign court without jurisdiction is not binding, and the plaintiffs further allege that the defendants herein were neither parties nor privies to the said judgment and suit, and therefore said judgment is not a bar to this action."

The Court is specially referred to Mr. Boerman's brief (p. 11) in which he has so clearly demonstrated that:

"The judgment of a foreign court, and especially a French Court, upon the rights or title to real estate, situated in this country, has not the effect of *res adjudicata.*"

He has demonstrated with equal clearness (p. 15) that:

"A decree in equity rendered upon a demurrer to the bill without considering the merits of the case has not the effect of *res adjudicata.*" The authorities cited by Mr. Boerman demonstrate that where there was *no jurisdiction* in the court over the case, a dismissal of the bill can be no bar. As the plaintiffs in error were not in possession of the land in question when the bill *quia timet* was filed, the Court dismissing it was without jurisdiction. United States *v.* Wilson, 118 U. S. 86.

That defense is really unworthy of any consideration in view of the admission made in the opinion of the District Judge (Record, p. 39) that while the heirs of Fleurian had filed in that Court a bill to quiet their title "*the papers are not before us.*" The Judge's statements or impressions on that branch of the case are, indeed, very misty.

Admitting as defendants in error do that the facts stated in the replication are true it clearly appears, as a matter of law, that all of the special pleas based upon res judicata are absolutely worthless.

I really feel that it is disrespectful to this Court to assume by serious argument that it will be inclined to find a way, upon such a record, to affirm the judgment of the District Court of Porto Rico, based as it is upon such a gross abuse of judicial power, involving the denial of the right to trial by jury in a case at law.

Respectfully submitted.

HANNIS TAYLOR,
Of Counsel for Plaintiffs in Error.

Supreme Court of the United St

OCTOBER TERM, 1909.

No. 155.

MARIA MARGARITA VOLCEY, WIDOW OF FLEURIAN;
MARIA ELIZABETH ODETTE FLEURIAN AND
MARIA ANTOINETTE EMMA FLEURIAN,
WIDOW OF SOUFFRONT, PLAINTIFFS IN ERROR,

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO,
AND ERNESTO MAURICE, DEFENDANTS IN ERROR.

In error to the District Court of the United States for Porto Rico.

BRIEF FOR DEFENDANTS IN ERROR.

CHARLES HARTZELL,
MANUEL RODRIGUEZ-SERRA,
Counsel for Defendants in Error.

San Juan, Porto Rico.

In the Supreme Court of the United States

OCTOBER TERM, 1909.

No. 155.

MARÍA MARGARITA VOLCEY SOUFFRONT, widow of FLEURIAN; MARÍA ELIZABETH ODETTE FLEURIAN and MARÍA ANTOINETTE EMMA FLEURIAN, widow of SOUFFRONT,
Plaintiffs in Error,

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO, AND ERNESTO MAURICE,
Defendants in Error.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

In presenting to the Court our views, with reference to the points raised and relied upon in the Brief and argument filed by plaintiffs in error herein, we shall follow in the general line of argument the points as presented and enumerated therein.

The case herein presented is an issue raised by a complaint in an ordinary action for ejectment and to which had been presented, by way of answer, five separate defenses: first, a general denial; second, prescription; and third, fourth and fifth, various legal proceedings affecting, as defendants in error contend, the same parties and the same controversy, and which are pleaded by way of res adjudicata to plaintiffs action. To these defenses the replication of plaintiffs in error is filed, which admits the

existence and status of the legal proceedings alleged and relied upon in the third, fourth and fifth defenses of the answer, but seeks to avoid their effectiveness for the purposes mentioned on technical grounds.

The third defense presented in the answer below is a recital of a series of litigation between the ancestor of plaintiffs in error and the grantors of defendants in error, these proceedings resulting in a final judgment and adjudication of the matters involved in this action, by the Court of First Instance of Ponce,—a court having unquestioned jurisdiction over the persons and property involved. and followed by an affirmance of said judgment by the Supreme Court of Porto Rico, is we maintain, an absolute and complete bar to the further prosecution of this proceeding.

Plaintiffs in error, in attempting to evade or escape the force of the decision set forth in the third defense of the answer, makes but a single argument against the effectiveness of the said proceeding for the purposes for which they are invoked namely, that Forgas and Gallart, being the grantors of defendants in error, had purchased the premises in controversy from what was known as the Laporte family—the original owners thereof—prior to the time that the Laportes as plaintiffs instituted the suit in Ponce, which is here relied upon as a bar to the prosecution of this action. In other words, the contention upon which plaintiffs in error rely, with reference to this defense, is that the original owners having made sale of the property, a suit instituted by them subsequent thereto, for the purpose of clearing the cloud from the title to the property represented by the claim of plaintiffs in error, would not inure to the benefit of subsequent purchasers and that that privity which the law requires would not exist, so as to enable such purchasers to enjoy the benefit of the same as an adjudication.

It appears from the allegations of the answer (folios 11 and 12) thatwhen these premises were sold, in October, 1883, by the Laporte family, that certain proceedings were then pending in the courts of the Republic of France affecting the said property, and that in the execution of the deed for the conveyance of the property in question from the Laporte family to the said Forgas and Gallart, it was expressly contracted and agreed that the said prior owners

should conduct the litigation necessary to free the title to said premises from any lien, cloud or encumbrances whatsoever, and that a large proportion of the purchase price of said premises was expressly made payable upon the faithful performance of this condition; and that it was in pursuance of the said obligation imposed by the said deed, that in additional to the proceedings then pending in the courts of France, the additional proceedings were instituted in the Courts of Porto Rico, which are relied upon as the basis of the third defense in this action.

Under the conditions so stated and especially in view of the status of the laws of Spain and Porto Rico, and which were then in force in Porto Rico, there would seem to be no doubt but that the purchasers who were entitled to secure the title to such premises, free and clear from the cloud imposed by the claims of the ancestor of plaintiffs in error, would certainly be in privity with the plaintiffs in the proceedings so instituted; and that the final decision of the Courts of Porto Rico, in connection with said procedings, should be a final bar which could be invoked by any subsequent purchaser or possessor of the premises.

Under the doctrine announced by this Honorable Court in the Cessna Case 169 U. S. 165 and which has been referred to and affirmed by subsequent decisions of this court, it has been adjudicated that a nation acquiring territory, whether by purchase, conquest or otherwise, is not nor are its courts bound to pass upon or correct wrongs which may have been inflicted or permitted by the ceding nation to one of its subjects or affecting property within the ceded or acquired jurisdiction; and we urge that the final decision pronounced by the courts of Porto Rico, as set forth in the third defense herein, must be taken and considered as a valid and binding decision capable of being executed for the purposes stated therein, and subject to be invoked at any time when its force or binding effect may be brought into controversy.

At the time of the rendition of that decision the laws of Spain did not embody either the law or the principle which is invoked here, for the protection of plaintiffs in error, from the force of the Civil Code which was then in force and effect in Porto Rico, and specifically by virtue of Sections 1364 and 1377 thereof, we maintain that without

the special provision in the deed to which we have referred, it was the duty of the seller to have prosecuted to a final conclusion, and to wage in his own name, all suits or proceedings necessary to complete a perfect title, to the purchaser of the thing sold; and we therefore urge that these proceedings in the Porto Rican courts, more than twenty years ago, should at this time be held to be fully effectual, and should be given their full and binding force and effect, and not be in anywise modified by any rule of law or procedure which has followed the American occupation of the Island.

But more important and directly in point, with reference to the question here raised, is that provision of Section 1219 of the Civil Code of Porto Rico which is identical with Section 1259 of the former Civil Code which was in force at the time of the transactions in controversy, relating to res adjudicata, the last paragraph of which reads as follows:

> "It is understood that there is identity of persons "whenever the litigants of the second suit are legal "representatives of those who litigated in the preced- "ind suit, or when they are jointly bound with them, "or by the relations established by the indivisibility of "prestations among those having a right to demand "them or the obligation to satisfy the same."

In this matter, by Section 1364 of the Civil Code, a vendor is bound to deliver and warrant the thing which is the object of the sale; and by Section 1377 it is provided that by virtue of the warranty referred to in Section 1364, the vendor shall warrant to the vendee, first, the legal and peaceful possession of the thing sold; second; that there are no hidden faults or defects therein.

This in addition to the binding and obligatory provision contained in the deed itself, which required that the vendors should prosecute to final determination all litigation necessary to free the title to the property in question, would seem to fall absolutely within the provisions of the section to which we have called attention, and which specifically provides that there is the identity of persons necessary to invoke res adjudicate in all cases, where the relations between the parties are such as to entitle one to the right to demand the performance of a thing, or where the obligation of satisfying the same shall exist.

It is further urged that as is disclosed by the record herein, the proceedings instituted and prosecuted to their final determination in Porto Rico, were in reality but the continuation of the prior proceedings affecting the same identical question which had been waged to a final determination in the courts of the Republic of France, and that the matters involved in the present suit were all of them fully passed upon and adjudicated, and the rights of the ancestor, through whom plaintiffs in error claim, as well as those of defendants in error and their grantors, had been fully and effectually disposed of and determined.

In connection with the fourth defense presented by the answer, counsel for plantiffs in error urge that the same is without force or effect because of having been carried on in foreign courts to-wit, in the courts of France.

An inspection of the record shows that counsel is mistaken in asserting that the issue involved was one based upon the rights or title to real estate situated in Porto Rico. On the contrary, the record discloses that the courts of France had full jurisdiction of the parties and subject matter of the controversy, and that the object sought to be accomplished was the cancellation and nullification of a certain contract or agreement which had been executed between the parties. The law of Civil Procedure for Cuba and Porto Rico, which was published by the Royal Decree to take effect on the first day of January, 1886, provides at Section 950, as follows:

> "Final judgments rendered in foreign countries "shall have in the territory of the islands of Cuba and "Porto Rico the force established in the respective "treaties made by Spain".....

and at Section 953:

> "If the judgment should not be included in any "of the cases mentioned in the three foregoing articles, "the final judgments shall have force in said territory "if the following circumstances are attendant.
>
> "Fourth, that the writ of execution possessed the "requisites necessary in the nation in which it was "rendered in order to be considered authentic and re- "quisites which the Spanish laws require in order to "be admissible in Spain." Article 954,—"The execu- "tion of judgments rendered in foreign countries must "be requested of the Supreme Court."

We also find by an examination of the archives, that full and liberal commercial and other treaties, with broad provisions, were in full force and effect between Spain and France; and therefore we urge that, under the direct provisions of the said Code, the judgment in question finally determining the rights of these parties, in the courts of France, was entitled and is now entitled to full force and effect in Porto Rico. The several treaties in force between France and Spain at that time are found in the Book of Codes, Laws and Treaties in force for Spain, published by Don Carlos D. Ochoa, in 1865, commencing on page 613.

We therefore respectfully maintain that the adjudication of the Court of Appeals of Nimes, France, fully passing upon and adjudicating the rights of the grantors and ancestor of the parties to this proceeding, was a final and complete decision of the matters involved herein and should be sustained as a complete defense to this action.

Coming now to the fifth defense presented by the answer herein. which sets forth that in the year 1904 these same plaintiffs in error presented in the United States District Court for the District of Porto Rico their bill in equity, naming the grantors of defendants in error as defendants therein, and in and by which bill in equity it was sought to secure a decree adjudicating to the said plaintiffs in error the title to the premises in controversy; and that such proceedings were had therein as that a demurrer to the said bill of complaint, based on the grounds of laches and want of equity, was sustained by the said court and a final decision therein was rendered and entered dismissing the said bill in equity at plaintiffs' cost.

In the defense counsel for plaintiffs in error urges in his brief that the decision in question did not involve the consideration of the merits of the case presented and that therefore the same should not be considered as res adjudicate. We urge, relying upon the decisions of this Honorable Court, that this decision not having been made without prejudice and no rights of complainants therein having been reserved to institute any further proceeding, was a full, final and complete adjudication of the matter presented by the said bill of complaint, to the same extent and with the same force and effect as though answer had been made and the cause had been fully tried upon its

merits. In the case of Alley v. Nott. 111 U. S. 473, this court said:

> "A demurrer to a complaint, because it does not "state facts sufficient to constitute a cause of action, is "equivalent to a general demurrer to a declaration at "common law and raises an issue which, when tried, "will finally dispose of the case, as stated in the com "plaint, on its merits, unless leave to amend or plead "over is granted. The trial of such an issue is the "trial of the cause, as a cause, and not the settlement "of a more matter of form in proceeding. There can "be no other trial, except at the discretion of the "court, and, if final judgment is entered on the de- "murrer, it will be a final determination of the rights "of the parties which can be pleaded in bar to any "other suit for the same cause of action."

In the case at bar the demurrer to the bill in equity was for the lack of facts to justify equitable relief, or, as is commonly stated, for want of equity, and the sustaining of the demurrer in question was the final determination of the issue, and the final decree adjudging that the bill be dismissed for want of equity at complainants' costs, without leave to plead over or amend, was a final adjudication of the controversy. And in the case of Bissell v. Township of Spring Valley, 124 U. S. 232, it was held:

> "A judgment rendered upon demurrer is equally "as conclusive by way of estoppel of the facts con- "fessed by the demurrer, as a verdict finding the same "facts would have been; and facts thus established can "never afterwards be contested between the same par- "ties or these in privity with them."

And in Gould v. Evansville & Crawfordsville R. R. Co., 91 U. S. 533, the court held:

> "A judgment rendered upon demurrer to the de- "claration is equally conclusive of the matters con- "fessed by the demurrer as a verdict finding the same "facts would be, and the plaintiff can never after "maintain against the same defendant, or his privies "any similar or concurrent action. for the same cause, "upon the same grounds as were disclosed in the first "declaration."

These cases, and many others referred to therein, establish beyond controversy that, if the necessary identity of action and parties existed in the bill in equity, which is the foundation of the fifth defense, that then that decision

would be final and binding for all time as to the matters therein and thereby presented. It is alleged in and by the fifth answer that the said bill in equity was brought by the said plaintiffs in error as complainants, claiming the ownership of the identical premises involved in this controversy, and that the said action was brought, as shown by the prayer of the said bill of complaint, to secure a decree declaring the plaintiffs in error to be the owners of the said premises, and to have declared null and void and of no effect the deed to the said premises executed by Laporte and others to Forgas and Gallart, who were the grantors of these defendants in error, and to recover the proceeds and profits from the said premises during the occupancy thereof by the said Forgas and Gallart; and we therefore maintain that the necessary identity of cause of action and parties existed, and that the decision of the United States District Court for Porto Rico, sustaining the demurrer to said bill of complaint, and ordering the same to be dismissed, was a full, final and complete adjudication of the controversy which is sought to be waged in this present action.

Counsel for plaintiffs in error, in what is designated as Point 6 in their brief present for the first time a suggestion that in this controversy the United States District Court for Porto Rico was without jurisdiction to render a judgment upon the pleadings, as appears to have been done.

We find, however, that in this case the judgment of the District Court of Porto Rico was based entirely upon facts which were not controverted by the pleadings. On the contrary, in the replication which was filed for plaintiffs in error and which is set forth at folio 67 of the transcript of the record, the plaintiffs in error expressly admit the existence and status of the judgments which formed the basis of the Third, Fourth and Fifth defenses.

It would, of course, be true if there were not the admissions thus contained in the said replication, that a trial of the issues would have been necessary with the intervention of a jury, but, whereas in this case the replication expressly admits the existence of the facts which are alleged as constituting these various defenses, it becomes simply a question of law for the determination of the court as to the sufficiency of such defenses.

In conclusion it is respectfully submitted that the mat-

ters forming the basis of this controversy have been not only tried, but have been finally determined by courts of competent jurisdiction of three nations, that this vexatious litigation, which has been waged for more than twenty years, must certainly be held to be barred by the proceedings either of the French courts, of the Porto Rican courts, or of the District Court of the United States; which judgments, all of them, standing unrepealed, in full force and effect, pleaded as the third, fourth and fifth defenses in the answer and expressly admitted by the allegations of the replication, must certainly give to defendants in error the right to urge that this extensive and vexatious litigation should no longer endure.

Respectfully submitted,

CHARLES HARTZELL,

MANUEL RODRIGUEZ-SERRA,

Counsel for Defendants in Error.

San Juan, Porto Rico, January 7th, 1910.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 155.

MARIA MARGARITA VOLCEY SOUFFRONT ET AL.,
PLAINTIFFS IN ERROR,

vs.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO ET AL., DEFENDANTS IN ERROR.

TRANSLATION OF A PORTION OF THE OPINION OF THE SUPREME COURT OF PORTO RICO IN THE CASE OF PETRONA DEL CARMEN GONZALEZ, APPELLANT, *VS.* MANUEL MENDEZ RODRIGUEZ ET AL., APPELLEES.

PRESENTED AS SUPPLEMENTAL TO THE BRIEF OF DEFENDANTS IN ERROR.

(*Translation.*)

* * * * * * *

First. If there is any presumption and exception of case adjudicated (*cosa juzgada—res adjudicata*) alleged by all the defendants in answer to the complaint.

Second. If Petrona Resto may be considered, judicially speaking, as the natural mother of the present plaintiff, Petrona del Carmen González.

Third. If as the natural mother she had at times the guardianship of her minor daughter.

Fourth. If the deed of June 19, 1896, is void, Don Jacinto Gómez having concurred in its execution merely as a partner in the commercial house, he being appointed executor by Don Domingo González in his will.

Fifth. If there appears in the register of property of Humacao the cause of annulment from lack of legal capacity on the part of the minor and her mother to enter into a contract, and consequently, in affirmative case, if the mortgage obligations (obligaciones hypotecarias) are set aside which were placed by Gómez, Méndez & Co. upon various properties in favor of the American Colonial Bank and the Sucesores de L. Villamil & Co. by deeds of August 3, 1901, May 12, 1903, and June 23, 1905, and in which mortgaged properties (fincas hypotecadas) Doña Petrona del Carmen González had a share, and which passed to the ownership of the firm Méndez, Gómez & Co. by virtue of the cession of rights and shares set forth in the deed of June 19, 1896.

We will consider first the question of presumption and exception of case adjudicated, which, as said above, was duly alleged by all the defendants.

It is necessary to state, for greater clearness in argument, that the present plaintiff is the same as the one in the preceding suit.

In the first trial, which was settled by final judgment, the deed of June 19, 1896, was set aside on the ground that the mother, the guardian, could not alienate the real property of her daughter except for justifiable reasons of expediency or necessity, and after having obtained authorization from the judge having jurisdiction, with the consent of the fiscal, requirements which were utterly disregarded by the mother of the minor, the contracting party in said deed.

Let it be noted that article 164 of the old Civil Code, which provides as above set forth, is found in chapter 3d treating "of the effects of guardianship in respect to the property of the children."

So that in proceeding as the plaintiff did proceed, praying that the deed be set aside solely because of non-fulfillment of judicial requirements, and non-compliance with procedure already named, she acknowledged the guardianship of her mother, forasmuch as there is equivalent thereto the acknowledgment made by her husband, Don Delfin Sierra Cuesta, who, in the first suit, was the legal representative of the minor as *guardian ad litem* appointed by the court.

So that now the capacity of the mother, Doña Petrona Resto Negron, is attacked and denied, which was then—that is, in the first suit—acknowledged explicitly and decidedly.

Now, in this suit it is again asked to set aside the deed of June 19, 1896, on the ground that the mother never had the guardianship of her daughter, and consequently could not exercise it or make a contract upon the property of the minor, who, as emancipated, required a guardian appointed by the court, with all legal formalities, to act for the said minor, now of age, Doña Petrona del Carmen González.

This reason now alleged for annulment, as well as the one relative to Don Jacinto Gómez, the executor, if they exist now, existed when the plaintiff instituted her first suit, but, nevertheless, she did not advance them then, but only founded her claim upon what she believed was covered by article 164 of the old Civil Code.

But let us see whether there really is or is not presumption of case adjudicated.

Don Jaoquin Esriche in his dictionary defines case adjudicated, saying that it is:

> "What has been decided in a trial by a valid decree from which there is and can be no appeal, either because the appeal is not admissible, or because the judgment has been accepted, either because the ap-

peal was not interposed within the period prescribed by law, or having been interposed, was denied."

And he goes on to say:

"The case adjudicated is presumed rightfully adjudicated, and the law makes it irrevocable, not allowing the parties to prove the contrary, because otherwise the suits would never have an end" (Law 19*a*, title 22, part 3*a*).

Hence comes the maxim of Roman law, "*Res judicata pro verita habetur.*"

The respect with which the law vests the case adjudicated has for its object the preservation of public peace.

It has been suitably regulated, and now it is easier to discover when all the elements concur therein.

Article 1219 of the Civil Code in force says:

"* * * In order that the presumption of *res adjudicata* may be valid in another suit, it is necessary that between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants and their capacity as such. * * *

"It is understood that there is identity of persons whenever the litigants of the second suit are legal representatives of those who litigated in the preceding suit, or when they are jointly bound with them or by their relations established by the indivisibility of presentations among those having the right to demand them, or the obligation to satisfy the same."

The Supreme Court of Spain, interpreting article 1252 of the old Civil Code, which is the same as 1219 of the one in force, has set forth the following doctrine in its decision of November 18, 1903:

"Presumption of case adjudicated exists when among the litigants in the preceding and the present suit there is the joint relationship which gives both parties to the suit the same reasons for bringing suit,

to invoke the same bases, and rest the claim on allegations that make identical the condition of the parties and the result desired in relation to the title invoked, although it be attempted, as in the present case, to establish some shade of difference in the accidents of personality of the defendant; because in such case what is of more importance than distinct actions would be new allegations which occur to the parties to contest a judgment after its execution, and would result in contradicting what has already been decreed and decided, violating the laws and fundamental doctrines established upon the efficacy and unchangeableness of the case adjudicated."

The question may arise that in this suit the parties defendant are not identically the same as in the preceding one, forasmuch as in the latter they were all those who executed the deed of June 19, 1896, asked to be set aside.

But it must be borne in mind that in the two trials the mercantile firm, purchaser of the shares and hereditary rights of the vendor, Doña Patrona González, was a party, and those purchasers are the ones exclusively affected by the validity or annulment of the aforesaid deed.

Moreover, said deed is not voided by the fact that in the second suit one of the defendants in the first is not a party thereto (Decision of the Supreme Court of Spain, May 5, 1900). Therefore in this case there is perfect identity of persons in both litigations, and the capacity is likewise identical of plaintiff and defendants.

It is true that other parties are now brought in as defendants, the American Colonial Bank and the Sucesores de L. Villamil & Co., but these are mortgagees of the mortgaging firm, defendant here, and they are consequently jointly associated in the mortgages executed upon the properties in litigation.

This new and subsequent accident cannot destroy the legal identity explained in article 1219 of the Civil Code in force and inserted above.

There is likewise identity of things, forasmuch as in the first suit it was prayed as essential finality that the hereditary property be recovered as a result of the invalidity of the aforesaid deed, and in this suit precisely the same petition is made

There remains to consider whether there is identity of cause or of action as was said in the old law.

We must not lose sight of the fact that in both litigations prayer was made to set aside the deed of June 19, 1896, and only the reasons vary for asking therefor. In this difference it appears that the appellant relied principally upon the denial of the exception of case adjudicated.

The following question was submitted to the Supreme Court of Spain:

In both suits question arose as to the validity of a document: "Will the presumption of case adjudicated be of no effect because in the second suit reasons were advanced for annulment distinct from those that were the subject of argument in the first, the object of the parties in both suits being to determine who was the owner of certain property?"

The case in question is analogous, and the Supreme Court of Spain in its ruling of March 14, 1898, established the following doctrine:

> "* * * that even when it is evident that in the present suit the reasons for voiding attributed to the title on which Don Casimiro Rodriguez founded his action for recovery, were not invoked in the previous one, it is no less evident that the opinion formed then of its validity in order to grant the recovery sought cannot but affect the conditions thereof, since if neither the trial court nor the Supreme Court had to take any into account in deciding the appeal to the court of cassation, because the parties did not deem it expedient to plead them, just as the point in the suit of 1887 was settled, and bearing in mind not only the proposed exception but the nature of the action in process, according to which the principal was compelled to prove the ownership claimed, it is forced

to acknowledge that in finding it justifiable, the court rendered definite and final decision upon the legal efficiency of the adjudications which Don Braulio García Vaquero made for the purposes of the recovery prayed for; for in the respective trials the litigants must utilize every means of defense to avoid confusions and uncertainty, which would arise if the various reasons that might be suggested to the parties in contesting a judgment after trial were not considered as independent actions, while it is unquestionable that when the point was argued in 1887 as to the validity of title of ownership submitted with the petition the causes or reasons for setting aside now alleged were already known.

"Whereas, granted that the Audiencia of Valladolid, in finding the exception of case adjudicated as the main ground for final judgment, has not been guilty of the errors alleged in reasons 3d, 4th, and 5th of the appeal, inasmuch as the main purpose of the parties in both suits consisted in determining who is the owner of certain properties inherited from Doña Maria de la Devosa, decided in the suit of 1887 as the property of Don Casimiro Rodriguez, and there cannot now be made herein—without violating the same laws and doctrines relative to the case adjudicated, cited in said reasons—any declaration contradicting the final decree by new legal reasons that were not duly alleged."

In another judgment of January 15, 1901, the question was submitted to the same court that if annulment of a loan instrument is denied on the ground of not having previously obtained annulment of the judicial authorization which was asked in order to contract the loan, will the judgment create the exception of case adjudicated in the new suit instituted upon annulment of that authorization of the loan instrument and the trial resulting?

The Supreme Court decided in the affirmative, sustaining the existence of the exception of the suit adjudicated.

The defendant firm, Gómez, Mendez & Co., which bought from the plaintiff the shares and rights held by the latter

in the old firm, of which her father, Don Domingo González, was a member, did so by virtue of a title which they believed legitimate, and this notwithstanding they ran the risk of suit, and they logically thought that if they won this suit their title would be unassailable by the plaintiff, for they supposed, with reason, that she had alleged whatever she had to allege against the said title, and thus Gómez, Mendez & Co. defended themselves and secured a judgment in their favor on the 31st of March, 1905, one which was final, because, although the plaintiff entered a plea for reversal in the Supreme Court of the United States, it was denied and the record returned with the judgment for due execution.

Therefore Gómez, Mendez & Co. believed they could rest in the efficacy of their title and could freely make the disposition of that property in the course of their business they desired without the plaintiff being able to disturb it by contesting the efficacy of the same title by new reasons, but which have the same object, and that, knowing them, she might have alleged in the first suit.

This cannot be allowed, for a stable and serious condition of law never would be constituted, as the party who obtained a final judgment in his favor would be intangled often in as many other suits as there were reasons for pleading that might occur to a fertile imagination, and which, though distinct, were known upon instituting the first suit.

To allow this, confusion and unnecessary expenses would fall upon third parties, as happens in the present case, which brings into the suit the American Colonial Bank and the Sucesores de L. Villamil & Co., who, subsequent to the preceding suit and the final judgment which ended it, had entered into a contract with Gómez, Mendez & Co. to loan money on certain properties which are the bases of the real and final claim in both suits.

There exists then the alleged presumption and exception of case adjudicated, and therefore the judgment is confirmed, with the costs of appeal to be paid by the appellant.

and in view of the fact that the case is decided on the main issue it is unnecessary to consider the other questions alleged in the written plea submitted to this court.

JOSÉ MA. FIGUERAS,
Associate.

Decision.

SAN JUAN, PORTO RICO, *November* 19, 1909.

This court has carefully reviewed the transcript of the documents submitted for the purpose of appeal interposed in the aforesaid case, and has duly considered the allegations of the litigants in support of their respective claims, and for the reasons assigned in the ruling of the court attached to this decision it resolves to confirm, as it hereby does confirm, the judgment of the District Court of the Judicial District of Humacao of April 30, 1909, and hereby orders that the case be remanded to said court for its execution.

We thus declare, order and sign.

JOSÉ C. HERNANDEZ.
JOSÉ MA. FIGUERAS.
J. H. MACLEARY.
ADOLPH G. WOLF.

SOUFFRONT, WIDOW OF FLEURIAN, *v.* LA COMPAGNIE DES SUCRERIES DE PORTO RICO.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 155. Argued April 15, 1910.—Decided May 16, 1910.

Where the vendors bring an action in their own name but to protect their vendees, such vendees, although having acquired title prior to the institution of the action are privies thereto and may plead the judgment in such action as *res judicata;* in such a case the general rule that no one whose interest was acquired prior to the institution of the action is privy to the judgment rendered therein does not apply.

Under Spanish law it was competent for vendors after parting with title to conduct a litigation in their own names for the benefit of their vendees, and therefore a judgment in such a case inures to the benefit of the vendees as between them and the defendants against whom it was rendered and their respective privies.

One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record. *Lovejoy* v. *Murray*, 3 Wall. 1.

Assertions that parties are not privies to a judgment and cannot plead it as *res judicata* and that a judgment can be collaterally attacked as rendered against one insane at the time, raise questions of law, and where, as in this case, such questions are to be determined on the facts appearing in such judgments and in the pleadings the court does not usurp the functions of the jury by determining that the contentions raised by such assertions are without merit.

THE facts are stated in the opinion.

Mr. Hannis Taylor, with whom *Mr. Charles M. Boerman* was on the brief, for plaintiffs in error:

Those who acquire a title before any suit brought by the

vendors or former owners are not to be considered as privies to such suit or a judgment thereon. Freeman on Judgments, 1st ed., § 162; *Dull* v. *Blackman*, 169 U. S. 248; *Kerr* v. *Watts*, 6 Wheat. 560; *Canon River Mfg. Assn.* v. *Rogers*, 43 N. W. Rep. 792; *Sessions* v. *Johnson*, 95 U. S. 347; *Graham* v. *La Crosse M. R. Company*, 3 Wall. 704.

A party not concluded or bound by a judgment cannot invoke such judgment as estoppel against others. *Keokuk Railroad* v. *Scotland County*, 152 U. S. 326; *Bedon* v. *Devie*, 144 U. S. 143.

The judgment of a foreign court, and especially a French court, upon the rights or title to real estate, situated in this country, has not the effect of *res judicata*. *Dull* v. *Blackman*, 169 U. S. 246; *Carpenter* v. *Strange*, 141 U. S. 105. The court has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title. *Hart* v. *Sansom*, 110 U. S. 151, 155; *Massie* v. *Watts*, 6 Cranch, 148, citing Story, Confl. Laws, § 543; Whart., Confl. Laws, §§ 228, 289; *Watkins* v. *Holman*, 16 Pet. 25; *Northern Indiana Railroad* v. *Mich. Cent. Railroad*, 15 How. 233; *Davis* v. *Headly*, 22 N. J. Eq. (7 C. E. Green) 115; *Miller* v. *Birdsong*, 7 Baxter, 531; *Cooley* v. *Scarlett*, 38 Illinois, 316; *Gardner* v. *Ogden*, 22 N. Y. 327.

A decree in equity rendered upon a demurrer to the bill without considering the merits of the case has not the effect of *res judicata*. *Walden* v. *Bodley*, 14 Pet. 156; 1 Greenleaf's Ev., §§ 529, 530, and authorities there cited; *Hickey* v. *Stewart*, 3 How. 758; *Smith* v. *Sherwood*, 4 Connecticut, 276; *Stevens* v. *Hughes*, 31 Pa. St. 381; and see Freeman on Judgments, § 270.

As the action in the case at bar is in the nature of the trial of the title it is not barred even by a former judgment in ejectment. *Mallet* v. *Foxcroft*, 1 Story, 477; *Foxcroft* v. *Mallet*, 4 How. 378; *Strother* v. *Lucas*, 12 Pet. 434; *Merryman* v. *Bourne*, 9 Wall. 599.

A United States court in an action at law cannot render judgment without a jury upon the pleadings, where the facts alleged by one party are controverted by the other party.

Amendment VII to the Constitution of the United States; *United States* v. *La Vengeance*, 3 Dall. 297; *Bank of Columbia* v. *Oakly*, 4 Wheat. 235; *Edwards* v. *Elliot et al.*, 21 Wall. 532.

This article of the Constitution is in force in all the organized Territories of the United States. *Cannon* v. *Gilmer*, 131 U. S. 28; *Tompson* v. *Utah*, 170 U. S. 346.

Section 34 of the act temporarily to provide revenues and a civil government for Porto Rico, of April 12, 1900, provides, that the United States District Court for Porto Rico shall proceed in the same manner as a Circuit Court.

The single question which this court need consider is whether the District Court erred in substituting itself for the jury, and in passing upon the contested issues of fact presented by the replication, without a waiver of the right of trial by jury by consent of parties. The trial of issues of fact in civil cases by the courts of the United States without the intervention of a jury, can be had only when the parties waive their right to a jury by a stipulation in writing. *Baylis* v. *Travelers' Ins. Co.*, 113 U. S. 316; *Elmore* v. *Grymes*, 1 Pet. 469; *D'Wolf* v. *Rabaud*, 1 Pet. 476; *Castle* v. *Ballard*, 23 How. 172; *Hodges* v. *Easton*, 106 U. S. 408; *Idaho Land Co.* v. *Bradbury*, 132 U. S. 515; *Morgan* v. *Gay*, 19 Wall. 81; *Royal Ins. Co.* v. *Martin*, 192 U. S. 149. Trial by jury is a part of the machinery of the District Court of the United States in Porto Rico.

Mr. Charles Hartzell, with whom *Mr. Manuel Rodriguez-Serra* was on the brief, for defendants in error.

MR. JUSTICE WHITE delivered the opinion of the court.

In July, 1906, plaintiffs in error commenced this action in the District Court of the United States for the District of Porto Rico, to recover, from the defendants in error, the possession of certain described real estate and damages from April 12, 1904, for unlawfully withholding possession thereof.

The right to the relief sought was based upon the averment that one Clemente de Fleurian, at his death, on February 24, 1892, was seized in fee and entitled to the possession of the premises, and that he died intestate, leaving the plaintiffs—his widow and two children—"as his legal succession." A demurrer to the complaint was overruled, except as to the necessity of furnishing certain information in regard to rents and profits, which was afterwards done through the medium of a bill of particulars. The defendants filed a joint answer. In addition to a general denial, they pleaded title by adverse possession of twenty years, and that plaintiffs' right to recover was barred by reason of certain judgments obtained by the predecessors in title of defendants in actions prosecuted by them in the courts of France and in the courts of Porto Rico during the Spanish regime, and by reason of a judgment of dismissal entered in favor of predecessors in title of defendants and against the plaintiffs, in a suit in equity brought by the latter in the trial court below in the year 1904 to quiet the title to the premises in controversy. A motion was filed to strike out portions of the answer as alleging mere evidentiary matter, and a demurrer was also filed to the special defenses of *res judicata*. The motion and demurrer were overruled, the court filing an opinion, in which it detailed the substance of the matters set up in the answer, and, in effect, held that the decrees or judgments of the French and Porto Rican courts prior to the cession from Spain were *res judicata* as to the claims of the plaintiffs, unless their rights had subsequently arisen. After setting forth its reasons for such conclusion the court called upon the plaintiffs "to file a replication within ten days or such longer period as they may, if at all, be entitled to, setting up the fact whether or not the answer is true in so far as it sets out the source of plaintiffs' title and describes or recites these proceedings in other courts regarding this property." This requirement was followed by the statement that "If it shall transpire that the answer has set up the real facts in the case, then, on the application of

defendants, the action will be immediately dismissed at the cost of the plaintiffs." Thereafter a replication was filed on the part of the plaintiffs, which, omitting the title and the signatures of the attorneys, is as follows:

"Replication.

"Now come the plaintiffs herein, in conformity with the order of the court entered herein and make reply to the answer of the defendants as follows:

"First. They deny that the defendants have ever had any just title to the premises or that those from whom they derived title have possessed the premises in good faith or with just title.

"Second. The plaintiffs impugn the alleged prescription either of ten years or of twenty years.

"Third. The plaintiffs deny the allegations in the answer that the ancestor Clemente de Fleurian has obtained the deed to the properties described in the complaint through fraud and they allege that he purchased the said properties in good faith and for valuable consideration, and always was ready and the plaintiffs are ready to comply with all the conditions of the said deed of sale, and that said deed was delivered to him by the vendors and their agents.

"Fourth. The plaintiffs admit that the judgments mentioned in the answer as a third defense to the complaint have been rendered but the suits in which said judgments were rendered have been instituted against Clemente de Fleurian while he was insane and out of his mind and without any curator or guardian or committee of his person being named by the court; and that the defendants herein were neither parties nor privies to the said judgments and suits and appeals, and therefore said judgments cannot bar this action.

"Fifth. The plaintiffs admit that the judgment mentioned in the answer as a fourth defense to the complaint has been rendered, but the plaintiffs state that the court which rendered said judgment had no jurisdiction in the subject matter,

and said judgment being of a foreign court without jurisdiction is not binding; and the plaintiffs further allege that the defendants herein were neither parties nor privies to the said judgment and suit, and therefore said judgment is not a bar to this action.

"Sixth. The plaintiffs further replying say that the judgment or decree mentioned in the answer as a fifth defense to the complaint was rendered not upon the merits of the case and without any proof being taken, but only upon a demurrer to the complaint for want of equity and for laches, both purely equitable defenses available only in suits in equity, and the plaintiffs state that this decree is not a bar to this action.

"Wherefore the plaintiffs pray judgment thereon."

Thereupon the following entry of dismissal was made:

"Now come the plaintiffs by their attorneys, Boerman & Llorens, and file a replication to the answer in this cause, and upon consideration thereof it appears to come within the rule laid down in the court's opinion on the demurrer to the answer of the defendants filed June 1st. Now, upon application by Hartzell and Rodriguez, the attorneys of said defendants, the cause is dismissed at the cost of the plaintiffs, to be taxed by the clerk, for which execution may issue.

"Plaintiffs except to the dismissal hereof."

From this judgment of dismissal the appeal now before us was taken. In addition to assigning as error the overruling of the demurrers to the respective defenses of *res judicata*, it is set up that "The court erred in rendering judgment against the plaintiffs in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and facts as stated in the pleadings in said court."

As upon the overruling of the demurrer, the court in substance made it a condition for granting leave to reply to the answer that such reply should disclose that the answer had not set up the real facts in the case, which condition was manifestly not complied with in the replication, we shall review the

action of the court upon the hypothesis that the order overruling the demurrer had also absolutely decreed a dismissal of the complaint. On this assumption we proceed to examine the defense setting up as *res judicata* the judgments of the Porto Rican courts rendered during the Spanish regime to determine whether the court properly held that they barred recovery.

The defense in question covers twenty-six pages of the printed record, the judgment of the court of first instance embracing seventeen and that of the Supreme Court of Porto Rico seven pages. The judgments establish the following, among other, facts: The real estate, the subject of controversy, was a sugar plantation known by the name of Serrano. The plantation was owned in 1879 and prior thereto by David Laporte and others, and Clemente de Fleurian, through whom plaintiffs claim title, was the manager of the plantation. On October 9, 1879, what is termed a "private contract of sale" of the plantation to de Fleurian was executed in France. In November following the owners of the property brought suit in the civil court of Nimes, France, to annul the contract. On February 18, 1880—the day after the return of de Fleurian to Porto Rico—although the contract of sale was not of record in Porto Rico, de Fleurian mortgaged the plantation to one Labastide to secure the payment of 36,811 pesos. The civil court of Nimes on May 10, 1880, entered a decree of nullity in the suit brought by the Laportes, and this decree, upon the appeal of de Fleurian, was affirmed by the Court of Appeals of Nimes on March 24, 1885, and by the Court of Cassation on May 17, 1886.

Pending the litigation just referred to, the Laportes, in the proper district in Porto Rico, "instituted possessory proceedings for the said property," in which Labastide and his wife were summoned "as abutting owners," and, they not making opposition, the title of the Laportes was duly registered. Thereafter, the Laportes, by public instrument of October 16, 1883, "sold the property to Don Juan Forgas and

to Don Jose Gallart, free of all incumbrances, the vendors binding themselves to guarantee the title to the same as well as to answer for all obligations for which the said property might be liable."

In the defense we are considering it was averred that title to the premises came to the defendants through Forgas and Gallart. It is also averred as follows:

"That these defendants are the successors and privies in the ownership of said property to said original owners and to the said Gallart, and Forgas and the succession of Gallart by virtue of the said sale to the said Forgas and Gallart. That in the deed selling and conveying said premises by the said owner to the said Forgas and Gallart, it was expressly contracted and agreed that the said owners should conduct the litigation necessary to free the title of said premises from any lien, cloud or incumbrance whatsoever, and the same was made the express condition of the payment of a large portion of the purchase price of said premises. And that in pursuance of said obligation resting upon the said owners of said property, in addition to the proceedings in the courts of France hereinbefore referred to, the said owners of the said property commenced their action in the court of first instance in the judicial district of Ponce, Porto Rico, the district where the said lands were located, the said court having full jurisdiction over the said property and over the said defendants. The object of said suit being to cancel and to have declared null and void or for the rescission, as the case might be, of the private contract of sale of the said plantation described in plaintiff's complaint and known as 'Serrano,' and also to have declared null and void and for the rescission and cancellation of the said mortgage executed by the said Fleurian in favor of the said Labastide."

As above mentioned, the litigation in France was commenced by the Laportes before the sale to Forgas and Gallart, and continued after such sale, terminating in May, 1886. The action against de Fleurian and Labastide in the Porto

Rican courts, referred to in the excerpt just made, was commenced on May 9, 1887, and the final judgment of the trial court relied upon as *res judicata* was entered therein on October 26, 1889. In that judgment, after referring to the proceedings had in the litigation in France, as shown by the records of the judgments of the French courts which were in evidence, the court of first instance, after making certain statements as to the effect as *res judicata* of the French judgments, which statements are copied in the margin,[1] pro-

[1] 9. Whereas there is not any treaty between France and Spain providing special rules as to the force and efficacy of the contracts executed and of judgments rendered in civil matters in any one of said nations as regards the other, and therefore, the general principles of international law are applicable to the case, among which of said principles there is the principle of reciprocity, specially expressed as to the execution of judgments rendered by foreign courts in articles 951 and 952 of the law of Civil Procedure.

10. Whereas, according to the French legislation, real property, even if possessed by foreigners, is governed by the French law (article 3d of the Civil Code) "A judicial mortgage does not ensue from a judgment rendered in a foreign country except when such judgment has been declared executory by a French court" (paragraph 4 of article 2123); "contracts entered into in a foreign country and acts executed before foreign officers cannot produce mortgage on property in France" (article 2128); "the said acts and judgments are not subject to execution in France except in the manner and in the cases provided by articles 2123 and 2128 of the Civil Code" (article 546 of the Code of Procedure).

11. Whereas, according to the general interpretation in France as to the aforesaid provisions of its legislation, as well as to article 14 of the Civil Code, the acts and judgments rendered by foreign courts are subject to revision and new discussion before the French courts, and that in that respect and on the principle of reciprocity the final judgment rendered by the French courts, to which reference has been made in this action by the plaintiff, cannot produce the force and effect of *res judicata* as to a decision of the questions which are being ventilated in the same, especially when the same have not had the execuatur of the Supreme Court of Justice in the form provided by article 954 and subsequent articles of the said law of Civil Procedure.

12. Whereas, according to the principle of private international

ceeded to reinvestigate the merits of the controversy and determine the questions arising as matters of first impression, concluding by giving to the plaintiffs the full relief demanded, the judgment reading as follows:

"I adjudge that Don Clemente de Fleurian is held to have confessed to the questions propounded at folios 340 and 341 of the second record of the roll of evidence of the plaintiffs. I should declare and do declare also the nullity of the instrument of sale and of the instrument of mortgage of the sugar cane plantation, called 'El Serrano,' the first of which was executed in the private contract in Anduze, France, dated October ninth, eighteen hundred and seventy-nine, between the plaintiffs and Don Clemente de Fleurian, and the second named at Juana Diaz, before the notary Don Ramon Rodriguez, on the eighteenth day of February, eighteen hundred and eighty, by Don Clemente de Fleurian and Don Fernando Labastide, in consequence of which it is ordered that after this decision shall have been final, the annotation of the said instrument of mortgage in the registry of property be cancelled, for which purpose the proper orders shall issue with the necessary excerpts addressed to the registrar of property for the district, taxing all costs against the defendants, Don Clemente Fleurian and Don Fernando Labastide. Thus, finally adjudging, was pronounced, ordered and signed by the judge."

On an appeal, taken by Labastide, the Supreme Court of Porto Rico on January 28, 1891, affirmed the judgment of the court of first instance. Thereafter an appeal, also taken by

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law, sanctioned by the Supreme Court of Justice in several opinions, the efficacy of the acts or contracts affecting directly real property, are governed by the royal statute or namely, by the laws of the country where the real property is situated, and therefore, as the question in this suit is in regard to a property situated in a Spanish territory, the questions relating to the nullity or validity of the title to the said property, and of the mortgage put on the same, should be ventilated or decided in accordance with the Spanish laws. *Locus regit actum.*

Labastide, to the Supreme Court of Spain was dismissed, and it is averred in the answer that "the said decision of the Supreme Court of Porto Rico became firm and fixed, and is still in full force and effect;" and that pursuant to the decisions of the Porto Rican courts above referred to "the proper orders were issued and the registration of the said mortgage from the said Clemente de Fleurian to the said Labastide was duly cancelled and annulled in the registry of property of Ponce, and the said decision of the court of first instance of Ponce and the said decision of the Supreme Court of Porto Rico, confirming the same, have been carried out as to all matters and things which were ordered and directed therein and thereby."

The question then is whether these judgments of the courts of Porto Rico, entered in litigation prosecuted in the names of the former owners for the benefit of their vendees, through whom the defendants in this action deraign title, is, as contended by the defendants in error, "a full, complete and final determination of all the matters and things relating to the alleged title of the said Clemente de Fleurian in or to the said premises described in the plaintiff's complaint herein," operative as *res judicata* in favor of the defendants, and constituting a bar to the further prosecution of the proceedings under the complaint herein. We proceed to consider this question.

It is recited in the judgment entered on October 26, 1889, by the court of first instance of Porto Rico, that the then pending action was commenced on May 9, 1887, by the Laporte heirs, and it also expressly found that the property had been sold prior to the institution of the action, viz., on October 16, 1883, by the Laportes to Forgas and Gallart, from whom mediately or immediately the present defendants acquired title, "the vendors binding themselves to guarantee the title to the same as well as to answer for all obligations for which the said property might be liable." It is also apparent from the findings of the court that the action referred

to was intended to make effective the result of the proceedings instituted in France, which had been commenced in order to remove the cloud upon the title of the Laportes resulting from the contract of sale made to de Fleurian and the mortgage made by him to Labastide. As the judgment of the court of first instance reciting the facts referred to was affirmed by the Supreme Court of Porto Rico, we may properly assume that the Porto Rican courts did not consider that they were passing upon a merely moot question, but were of opinion that the adjudication made inured to the benefit of the vendees of the nominal complainants, such vendees being the real owners. It being then competent, under the Spanish law, for the vendors of property, after parting with title, to conduct in their own names for the benefit of their vendees a litigation having for its object ultimate relief such as was sought in the action so instituted by the Laporte heirs in 1887, we are of opinion that there is no merit in the contention upon which plaintiffs in error rely in assailing the sufficiency of the defense set up in the third paragraph of the answer. In effect, that contention simply was that as the original owners had sold the property before the institution of the action commenced in 1887 the defendants herein, as claimants under purchasers who had bought from the Laportes before the commencement of that action, are not in privity with the complainants in that suit, as they were mere strangers to the litigation and not entitled to enjoy the benefit of the adjudication. Let it be conceded, for the sake of argument, that ordinarily no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit (*Dull* v. *Blackman*, 169 U. S. 248; Freeman on Judgments, 1st ed., § 162), nevertheless the rule has no application to a case like this where the nominal plaintiffs or complainants were in legal intendment conducting the litigation under the direction and for the benefit of the real owners of the property. The persons for whose benefit, to the knowledge of the court and of all the parties

to the record, litigation is being conducted cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record. *Lovejoy* v. *Murray*, 3 Wall. 1.

There is no merit in the contention that in rendering judgment upon the pleadings the court usurped the province of the jury. In the view we have taken of the case it becomes necessary, for the purpose of testing that contention, to consider only the fourth paragraph of the replication, heretofore quoted. In asserting, as was done in that paragraph, "that the defendants herein were neither parties nor prives to the said judgments, suit and appeals (referred to in the third defense), and therefore said judgments cannot bar this action," there was presented merely a question of law as to whether, upon the facts appearing in the judgments or averred in the third defense, the defendants in this action were, as a matter of law, in privity with the complainants in the cause in which the judgments pleaded as *res judicata* were rendered. And this is true also as to the charge made in the fourth paragraph of the replication that de Fleurian was insane when the judgments relied upon as *res judicata* were entered. We say this because clearly whether the judgments on such mere averment were subject to be collaterally attacked was a matter of law for the court, even if the assumption be indulged in that the right to plead the asserted insanity, which we do not intimate to be the case, was within the condition as to replying imposed by the court when it overruled the demurrer.

Affirmed.